JEKS Engineering Sdn Bhd v PALI PTP Sdn Bhd and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24C-5–01 OF 2020 AND WA-24C-13–01 OF 2020
ALIZA SULAIMAN J
9 JULY 2021

Contract — Building contract — Claim for payment under interim certificates — Claim referred to arbitration under Construction Industry Payment Adjudication Act 2012 — Adjudicator made determination in favour of plaintiff — Plaintiff applied to enforce adjudication decision — Defendant applied to set aside and stay adjudication decision — Whether adjudication decision was improperly procured through fraud — Whether there had been denial of natural justice to defendant — Whether adjudicator failed to give reasoned decision — Whether adjudicator failed to consider submission or give proper weight to evidence — Whether adjudicator went on frolic of his own — Whether adjudicator acted in excess of jurisdiction — Whether enforcement application of adjudication decision ought to be allowed — Whether stay application of adjudication decision ought to be granted

Pursuant to a letter of award, PALI PTP Sdn Bhd ('PALI') appointed JEKS Engineering Sdn Bhd ('JEKS') to execute the main building works ('the works') for a project ('the project') for the contract sum of RM136,300,000. The date of commencement of the works was 15 February 2017 and the completion date shall be on or before 15 May 2018. By way of a supplemental agreement, the parties agreed, among others, to revise the completion date for the whole of the works to 15 August 2018. PALI's superintending officer ('SO') issued the certificate of practical completion ('CPC') on 30 November 2018 certifying that the works were satisfactorily completed on 23 October 2018 with minor outstanding works and defects as per the lists enclosed with the CPC, which shall be completed and make good on or before 31 December 2018 as committed by JEKS via its undertaking letter. On 7 March 2019, the SO issued the certificate of taking over pursuant to cl 39.0 of the conditions of contract stating, inter alia, that the minor outstanding works were to be accomplished on or before 29 May 2019, the site and works were taken over by PALI on 7 March 2019 and the defects liability period shall commence from 7 March 2019 and end on 6 September 2020. JEKS claimed that it had completed the works but PALI failed to make payments to JEKS. Consequently, JEKS issued a payment claim pursuant to s 5 of the Construction Industry Payment Adjudication Act 2012 ('the CIPAA') for unpaid certified works done based on interim payment certificates Nos 19 to 23 including release of one half of the retention sum, late payment interest and variation works up to interim

payment certificate No 23 and progress claim ('PC') No 24 amounting to RM20,941,849.43. PALI disputed the entire payment claim and crossclaimed against JEKS for liquidated damages ('LD'), penalties for external and infrastructure works, and health, safety and environment non-compliance, defects, maintenance and service works and non-compliance records. JEKS submitted its notice of adjudication. The adjudication claim, adjudication response and adjudication reply were accordingly issued. The adjudicator made a determination in favour of JEKS and the adjudicated sum was RM8,512,737.03. JEKS applied to enforce the adjudication decision ('AD') by the adjudicator ('the enforcement application'). PALI applied to set aside the AD ('the setting aside application') and to stay the AD ('the stay application').

Held, allowing the setting aside and enforcement application in part; and dismissing the stay application:

(1) The court could not set aside the AD on the ground that the adjudicator had made an erroneous assessment of the evidence before him, there was an error as to his findings of fact and/or he had omitted to make a finding of fact which could be adequately supported by the evidence. It was well established that in this setting aside application, the court could not review the merits of the AD. Furthermore, under s 15(a) of the CIPAA, the burden was on PALI to prove, on a balance of probabilities, that the AD had been improperly procured through fraud by way of clear and unambiguous evidence. PALI had not discharged the onus of proving fraud committed by JEKS in obtaining the AD on the standard of proof of a balance of probabilities (see paras 29–30, 35 & 37).

(2) PALI's challenge against the AD on the ground that the adjudicator failed to give a reasoned decision was entirely baseless. The reasons, brief as they may be, were nonetheless the adjudicator's justification in allowing JEKS' application for extension of time of ten days. The correctness or otherwise of the findings by the adjudicator, in fact and/or in law, was not a matter that could be examined by the court. Furthermore, since the only *gazetted* holidays raised by JEKS in subpara 46(c) in the adjudication claim were for five days, the five days reduction in the calculation for LD as decided by the adjudicator must relate to the same five days for *gazetted* holidays. Therefore, PALI's challenge against the AD premised on the aforesaid ground was unmeritorious (see paras 45 & 49–50).

(3) The adjudicator had given proper and due consideration to the evidence and it was within his discretion to determine the weight to be accorded to each piece of evidence before him and to draw the necessary conclusions therefrom. PALI's complaints essentially related to the weight of evidence given by the adjudicator. However, it was settled law that in an application to set aside an adjudication decision, it was not for the court

to re-evaluate the evidence that had been submitted during the course of the adjudication proceedings. The AD could not be set aside just because, among others, the adjudicator had failed to attach weight to relevant evidence, undue weight had been given by him to any piece of evidence and he had assessed erroneously the evidence presented to him. Therefore the ground that the adjudicator failed to consider the plaintiff's submission or gave proper weight to PALI's evidence had not been established (see paras 56–57 & 67).

(4) An erroneous finding of mixed fact and law by the adjudicator was not a ground upon which the court could set aside the AD. PALI had not established that the adjudicator had acted in breach of the rules of natural justice by adjudicating the dispute upon a factual or legal basis which had not been argued or put forward by either side and without giving the parties an opportunity to comment, or where relevant, to put in further evidence. There was no merits in PALI's argument that the adjudicator went on a frolic of his own. The adjudicator preferred JEKS's approach as to the valuation of variation over PALI's and reasons were proffered. This was not a situation where the adjudicator had adopted a valuation procedure that was unknown to parties (see paras 75–76, 84 & 88–89).

(5) By considering and deciding on variation claims which were not due for payment at the time when the payment claim was issued, the AD had fallen to be challenged in the realm of core jurisdiction. In these circumstances, it would be wrong for the court to close its eyes to the jurisdictional error made by the adjudicator which had resulted in his finding on the claim for variations to be tainted as it included both items from PC No 23, which was within his jurisdiction, and items from PC No 24, which he was devoid of any jurisdiction (see para 111).

(6) The instant case was one where severance of the AD was compelling, sensible and well suited to meet the justice of the case. Following from the decision of the court that the adjudicator had no jurisdiction to deal with JEKS's claims for variations, that part of the AD must be set aside together with the interest allowed on the sum affected. The other parts of the AD were unaffected. However, the quantum of costs to be borne by PALI should correspondingly be reduced by 60% which was the approximate percentage of the amount that was set aside as against the sum of RM8,512,737.03. Correspondingly, JEKS's application for leave to enforce the AD was allowed for the sum of RM3,368,919.69 with interest thereon as ordered by the adjudicator and costs of the adjudication proceedings in the sum of RM60,929 (see paras 118–120).

(7) There were no valid grounds to stay the enforcement of part of the AD which remained intact in the sum of RM3,368,919.69 together with interest and the apportioned costs of the adjudication proceedings. As for the adjudicator's findings in respect of JEKS's claims for variation works

which had been proven to be tainted with jurisdictional error, this was an appropriate case for severance of the part of the AD where the adjudicator had exceeded his jurisdiction rather than to set aside the entire AD. In the same vein, there was no compelling reason as to why the court should stay the enforcement of the AD which was not affected by any jurisdictional errors on the part of the adjudicator. JEKS' overall monetary status had not reached a level of financial distress where it could be said that, on a balance of probabilities, JEKS would be unable to repay the sum of RM3,368,919.69 together with simple interest thereon and costs of the adjudication proceedings in the sum of RM60,929 (see paras 123, 125 & 127).

[Bahasa Malaysia summary

Melalui satu surat penganugerahan, PALI PTP Sdn Bhd ('PALI') melantik JEKS Engineering Sdn Bhd ('JEKS') untuk melaksanakan kerja-kerja bangunan utama ('kerja-kerja') untuk satu projek ('projek') untuk kontrak sejumlah RM136,300,000. Tarikh mula kerja-kerja adalah pada 15 Februari 2017 dan tarikh siap hendaklah pada atau sebelum 15 Mei 2018. Melalui perjanjian tambahan, pihak-pihak bersetuju, antara lain, untuk menyemak semula tarikh siap bagi keseluruhan kerja-kerja itu kepada 15 Ogos 2018. Pegawai penguasa PALI ('SO') mengeluarkan sijil perakuan siap kerja ('CPC') pada 30 November 2018 memperakui bahawa kerja-kerja telah disiapkan dengan memuaskan pada 23 Oktober 2018 dengan kerja-kerja kecil tertunggak dan kecacatan seperti dalam senarai yang dilampirkan bersama CPC, yang akan disiapkan dan dilaksanakan pada atau sebelum 31 Disember 2018 seperti yang dilakukan oleh JEKS melalui surat akujanjinya. Pada 7 Mac 2019, SO mengeluarkan sijil pengambilalihan menurut klausa 39.0 Syarat-syarat kontrak yang menyatakan, antara lain, bahawa kerja-kerja kecil yang belum selesai akan diselesaikan pada atau sebelum 29 Mei 2019, tapak dan kerja-kerja diambil alih oleh PALI pada 7 Mac 2019 dan tempoh liabiliti kecacatan akan bermula dari 7 Mac 2019 dan berakhir pada 6 September 2020. JEKS mendakwa telah menyiapkan kerja-kerja tersebut tetapi PALI gagal membuat pembayaran kepada JEKS. Akibatnya, JEKS mengeluarkan tuntutan bayaran menurut s 5 Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAPIP') untuk kerja dilakukan diperakui belum dibayar berdasarkan Sijil Pembayaran Interim No 19 hingga 23 termasuk pelepasan separuh daripada wang amanah, faedah pembayaran lewat dan kerja pengubahan sehingga Sijil Pembayaran Interim No 23 dan Tuntutan Kemajuan ('PC') No 24 berjumlah RM20,941,849.43. PALI mempertikaikan keseluruhan tuntutan pembayaran dan menuntut balas terhadap JEKS untuk ganti rugi tertentu ('LD'), penalti untuk kerja luar dan infrastruktur, dan ketidakpatuhan kesihatan, keselamatan and persekitaran, kecacatan, kerja penyelenggaraan and perkhidmatan serta rekod ketidakpatuhan. JEKS menyerahkan notis adjudikasinya. Tuntutan adjudikasi, respon adjudikasi dan jawapan adjudikasi telah dikeluarkan sewajarnya. Adjudikator membuat

penentuan memihak kepada JEKS dan jumlah yang diadili ialah RM8,512,737.03. JEKS memohon untuk menguatkuasakan keputusan adjudikasi ('AD') oleh adjudikator ('permohonan penguatkuasaan'). PALI memohon untuk mengetepikan AD ('permohonan mengetepikan') dan untuk menggantung AD ('permohonan penggantungan').

Diputuskan, membenarkan sebahagian permohonan mengetepikan dan penguatkuasaan; dan menolak permohonan penggantungan:

(1) Mahkamah tidak boleh mengetepikan AD atas alasan bahawa adjudikator telah membuat penilaian yang salah terhadap keterangan di hadapannya, terdapat kesilapan dalam penemuan faktanya dan/atau beliau telah mengabaikan untuk membuat penemuan fakta yang boleh disokong secukupnya oleh keterangan. Adalah diketahui dengan pasti bahawa dalam permohonan mengetepikan ini, mahkamah tidak boleh menyemak merit AD. Tambahan pula, di bawah s 15(a) APAPIP, beban terletak pada PALI untuk membuktikan, berdasarkan imbangan kebarangkalian, bahawa AD telah diperoleh secara tidak wajar melalui penipuan melalui keterangan yang jelas dan nyata. PALI tidak melepaskan tanggungjawab membuktikan penipuan yang dilakukan oleh JEKS dalam mendapatkan AD atas standard pembuktian imbangan kebarangkalian (lihat perenggan 29–30, 35 & 37).

(2) Bantahan PALI terhadap AD atas alasan bahawa adjudikator gagal memberikan keputusan yang munasabah adalah tidak berasas sama sekali. Alasannya, walaupun ringkas, adalah tetap justifikasi adjudikator membenarkan permohonan JEKS untuk lanjutan masa selama sepuluh hari. Ketepatan atau sebaliknya penemuan oleh adjudikator, dalam fakta dan/atau dalam undang-undang, bukanlah perkara yang boleh disemak oleh mahkamah. Tambahan pula, memandangkan cuti yang *diwartakan* yang dibangkitkan oleh JEKS dalam subperenggan 46(c) dalam tuntutan adjudikasi adalah selama lima hari, pengurangan lima hari dalam pengiraan untuk LD seperti yang diputuskan oleh adjudikator mestilah berkaitan dengan lima hari yang sama untuk cuti yang *diwartakan*. Oleh itu, bantahan PALI terhadap AD berdasarkan alasan yang dinyatakan di atas adalah tidak bermerit (lihat perenggan 45 & 49–50).

(3) Adjudikator telah memberikan pertimbangan yang wajar dan sepatutnya kepada keterangan dan adalah dalam budi bicaranya untuk menentukan berat yang akan diberikan kepada setiap keterangan di hadapannya dan untuk membuat kesimpulan yang perlu daripadanya. Aduan PALI pada asasnya berkaitan dengan berat keterangan yang diberikan oleh adjudikator. Walau bagaimanapun, undang-undang adalah mantap bahawa dalam permohonan untuk mengetepikan keputusan adjudikasi, mahkamah tidak berhak menilai semula keterangan yang telah dikemukakan semasa prosiding adjudikasi. AD tidak boleh diketepikan

hanya kerana, antara lain, adjudikator telah gagal memberikan berat kepada keterangan yang berkaitan, berat yang tidak wajar telah diberikan olehnya kepada mana-mana keterangan dan beliau telah tersilap menilai keterangan yang dikemukakan kepadanya. Oleh itu alasan bahawa adjudikator gagal mempertimbangkan penghujahan plaintif atau memberikan berat sewajarnya kepada keterangan PALI tidak dibuktikan (lihat perenggan 56–57 & 67).

(4) Dapatan salah fakta dan undang-undang oleh adjudikator bukanlah alasan di mana mahkamah boleh mengetepikan AD. PALI tidak membuktikan bahawa adjudikator telah bertindak melanggar peraturan keadilan semula jadi dengan menilai pertikaian atas dasar fakta atau undang-undang yang tidak dihujahkan atau dikemukakan oleh mana-mana pihak dan tanpa memberi pihak-pihak peluang untuk mengulas, atau di mana relevan, untuk meletakkan keterangan lanjut. Tiada merit dalam hujahan PALI bahawa adjudikator melakukan dapatan sendiri. Adjudikator lebih memihak pendekatan JEKS tentang penilaian pengubahan berbanding PALI dan alasan telah dikemukakan. Ini bukanlah situasi di mana adjudikator telah menerima pakai prosedur penilaian yang tidak diketahui oleh pihak-pihak (lihat perenggan 75–76, 84 & 88–89).

(5) Dengan mempertimbangkan dan memutuskan tuntutan pengubahan yang tidak perlu dibayar pada masa tuntutan pembayaran dikeluarkan, AD telah boleh dicabar dalam bidang kuasa teras. Dalam keadaan ini, adalah salah bagi mahkamah untuk menutup mata terhadap kesilapan bidang kuasa yang dibuat oleh adjudikator yang telah menyebabkan penemuannya mengenai tuntutan pengubahan akan tercemar kerana ia termasuk kedua-dua item daripada PC No 23, yang berada dalam lingkungan bidang kuasanya, dan item daripada PC No 24, yang beliau tidak mempunyai sebarang bidang kuasa (lihat perenggan 111).

(6) Kes ini adalah kes di mana pembatalan AD adalah harus, wajar dan sesuai untuk memenuhi keadilan kes itu. Berikutan daripada keputusan mahkamah bahawa adjudikator tidak mempunyai bidang kuasa untuk menangani tuntutan JEKS untuk pengubahan, bahagian AD tersebut mesti diketepikan bersama-sama dengan faedah yang dibenarkan ke atas jumlah yang terjejas. Bahagian lain AD tidak terjejas. Walau bagaimanapun, kuantum kos yang perlu ditanggung oleh PALI sepatutnya dikurangkan sebanyak 60% iaitu peratusan anggaran jumlah yang diketepikan berbanding jumlah RM8,512,737.03. Sejajar dengan itu, permohonan JEKS untuk kebenaran menguatkuasakan AD telah dibenarkan untuk jumlah RM3,368,919.69 dengan faedah seperti yang diarahkan oleh adjudikator dan kos prosiding adjudikasi berjumlah RM60,929 (lihat perenggan 118–120).

(7) Tiada alasan yang sah untuk menggantung penguatkuasaan sebahagian

daripada AD yang kekal utuh dalam jumlah RM3,368,919.69 berserta faedah dan kos yang diagihkan bagi prosiding adjudikasi. Bagi penemuan adjudikator berkenaan dengan tuntutan JEKS untuk kerja-kerja pengubahan yang telah terbukti dicemari dengan kesilapan bidang kuasa, ini adalah kes yang sesuai untuk pembatalan bahagian AD di mana adjudikator telah melebihi bidang kuasanya daripada mengetepikan keseluruhan AD. Dalam kes yang sama, tidak ada sebab yang meyakinkan mengapa mahkamah perlu menangguhkan penguatkuasaan AD yang tidak terjejas oleh sebarang kesilapan bidang kuasa di pihak adjudikator. Status kewangan keseluruhan JEKS tidak mencapai tahap kesusahan kewangan di mana boleh dikatakan bahawa, berdasarkan imbangan kebarangkalian, JEKS tidak akan dapat membayar balik jumlah RM3,368,919.69 berserta faedah mudah dan kos prosiding adjudikasi dalam jumlah RM60,929 (lihat perenggan 123, 125 & 127).]

Cases referred to

ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal [2016] MLJU 1776, CA (refd)

AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd [2009] SGHC 260, HC (refd)

Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd [2009] EWHC 2218 (TCC), QBD (refd)

Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd [2016] 7 MLJcon 119; [2015] 8 CLJ 728, HC (refd)

Bovis Lend Lease Ltd v Trustees of the London Clinic [2009] EWHC 64 (TCC), QBD (refd)

Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC), QBD (refd)

Paice (Gary) and Springall (Kim) v Harding (Matthew J) (trading as MJ Harding Contractors) [2016] EWHC B22 (TCC), QBD (refd)

Dataran Rentas Sdn Bhd v BMC Constructions Sdn Bhd [2008] 2 MLJ 856, CA (refd)

Emerald Capital (Ipoh) Sdn Bhd v Pasukhas Sdn Bhd and another appeal [2018] MLJU 440, HC (refd)

Euroland & Developments Sdn Bhd v Tack Yap Construction (M) Sdn Bhd and other appeals [2018] MLJU 1453, HC (refd)

Fastrack Contractors Ltd v Morrison Construction Ltd [2000] All ER (D) 11, QBD (refd)

Gantley Pty Ltd v Phoenix International Group Pty Ltd [2010] VSC 106, SC (refd)

Genting Malaysia Berhad v PLM Interiors Sdn Bhd and another case [2020] MLJU 344, HC (refd)

Guangxi Dev & Cap Sdn Bhd v Sycal Bhd [2018] MLJU 1542; [2019] 1 CLJ 592, CA (refd)

Gumi Asli Elektrikal Sdn Bhd v Dazzling Electrical (M) Sdn Bhd and another case [2020] MLJU 314; [2020] 1 LNS 189, HC (refd)

Harmony Teamwork Construction Sdn Bhd v Vital Talent Sdn Bhd [2017] 10 MLJ 726; [2017] 4 AMR 580, HC (refd)
KPF Niaga Sdn Bhd v Vigour Builders Sdn Bhd and another case [2021] MLJU 229; [2021] 1 LNS 141, HC (refd)
Naza Engineering & Construction Sdn Bhd v SSL Dev Sdn Bhd [2020] 9 MLJ 499; [2020] 2 MLRH 436, HC (refd)
PBS Energo AS v Bester Generacion UK Ltd [2020] 4 All ER 1101; [2020] EWCA Civ 404, CA (refd)
PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd and other suits [2017] MLJU 905, HC (refd)
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57, SC (refd)
Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals [2015] MLJU 1873, HC (refd)
SG South Ltd v King's Head Cirencester LLP and another [2009] EWHC 2645 (TCC), QBD (refd)
SKS Pavillion Sdn Bhd v Tasoon Injection Pile Sdn Bhd [2019] 9 MLJ 396; [2019] 2 CLJ 704, HC (refd)
Sigma Elevator (M) Sdn Bhd v Perbadanan Pengurusan City Plaza [2020] MLJU 258, HC (refd)
TYL Land and Development Sdn Bhd v SIS Integrated Sdn Bhd and another case [2018] MLJU 217; [2018] 2 MLRH 699, HC (refd)
Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case [2017] MLJU 242, HC (refd)
Thermal Energy Construction Ltd v AE & E Lentjes UK Ltd (2010) [2009] EWHC 408 (TCC), QBD (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22, FC (refd)
Vital Talent Sdn Bhd v Harmony Teamwork Construction Sdn Bhd [2017] MLJU 1160, HC (refd)
YTK Engineering Services Sdn Bhd v Towards Green Sdn Bhd and other applications [2017] MLJU 632; [2017] 5 AMR 76, HC (refd)

Legislation referred to

Companies Act 2016 ss 258, 259
Construction Industry Payment and Adjudication Act 2012 ss 4, 5, 5(2)(a), 6, 7, 12(2), (4), 15, 15(a), (b), (c), (d), 16, 16(1), (1)(a), (1)(b), 17, 25, 25(i), 27(1), 28, 28(1), (2)
Rules of Court 2012 O 69A rr 3, 4, O 92 r 4

Sanjay Mohanasundram (Wong Li-Wei and Mak Kit Teng with him) (Sanjay Mohan) in Originating Summons No WA-24C-5–01 of 2020 for the plaintiff.
Sivabalan Sankaran (Tharmini Paramasivam and Gok Chia Wen with him) (Tan Swee Im, Siva & Partners) in Originating Summons WA-24C-13–01 of 2020 for the plaintiff.
Sanjay Mohanasundram (Wong Li-Wei and Mak Kit Teng with him) (Sanjay

Mohan) in Originating Summons No WA-24C-13–01 of 2020 for the defendant.

Sivabalan Sankaran (Tharmini Paramasivam and Gok Chia Wen with him) (Tan Swee Im, Siva & Partners) in Originating Summons WA-24C-5–01 of 2020 for the defendant.

Aliza Sulaiman J:

INTRODUCTION

[1] The court heard the following applications together, with the consensus of the parties:

(a) the application by JEKS Engineering Sdn Bhd ('JEKS') pursuant to s 28 of the Construction Industry Payment and Adjudication Act 2012 (Act 746) ('the CIPAA'); O 69A r 5 and/or O 92 r 4 of the Rules of Court 2012 ('the RoC 2012'); and/or the inherent jurisdiction of the court in Originating Summons ('OS') No WA-24C-5–01 of 2020 (encl 1; 'enforcement application') to enforce the adjudication decision dated 25 November 2019 ('AD') and corrected on 13 January 2020 by the learned adjudicator, Mr Daniel Tan Chun Hao ('adjudicator');

(b) the application by PALI PTP Sdn Bhd ('PALI') pursuant to all four limbs under s 15 of the CIPAA and O 69A r 3, O 92 r 4 of the RoC 2012 and/or the inherent jurisdiction of the court in OS No WA-24C-13–01 of 2020 (encl 1; 'setting aside application') to set aside the AD; and

(c) the application by PALI pursuant to para 16(1)(a) and (b) CIPAA; O 69A r 4 and/or O 92 r 4 of the RoC 2012; and/or the inherent jurisdiction of the court in OS No WA-24C-5–01 of 2020 (encl 4; 'stay application') to stay the AD.

[2] Having considered the cause papers and written submissions filed, including the additional/supplementary submissions which were filed after hearing the oral submissions and further clarifications by learned counsels representing the parties, the court had pronounced the decision as follows:

(a) the setting aside application was allowed in part pursuant to s 15(d) of the CIPAA whereby the sum of RM5,143,817.34 awarded by the adjudicator for variation works was set aside and JEKS was ordered to pay costs of RM18,000 to PALI, subject to allocator;

(b) the part of the AD which was not ordered to be set aside was allowe of the d to be enforced as if it is a judgment or order of the High Court pursuant to s 28 of the CIPAA, namely that PALI is to pay JEKS the sum of RM3,368,919.69 together with simple interest thereon as ordered by the adjudicator, which is at the rate of 7.75%pa, from the date of the AD

until full realisation. The quantum of costs of the adjudication proceedings to be borne by PALI was correspondingly reduced by 60%, which is the approximate percentage of the amount that is set aside as against the sum of RM8,512,737.03. The reduced costs amount to RM60,929. No order as to costs was made for the enforcement application; and

(c) the stay application was dismissed with costs of RM5,000, subject to allocator.

[3] Both PALI and JEKS are aggrieved by the decision to partially allow the setting aside application and to partially enforce the AD whilst PALI is also dissatisfied with the decision with regards to the stay application.

[4] My full grounds for the decision are elaborated below.

SALIENT FACTS

[5] Pursuant to a letter of award dated 14 February 2017 ('LoA'), PALI appointed JEKS to execute the Main Building Works ('works') for the project known as 'Cadangan Meroboh Dan Membina Semula Perindustrian Yang Mengandungi:- (i) 1 Unit Gudang Sesebuah 2 Tingkat Berserta Pejabat 3 Tingkat Dan Tempat Letak Kenderaan Berbumbung Di Aras Bumbung; (ii) 2 Unit Pondok Pegawal; (iii) 1 Unit Pencawang Elektrik; (iv) 1 Unit Kebuk Sampah; (v) 1 Unit Rumah Pump; Dan (vi) 5 Unit Pondok Rehat Di Atas Lot DW1 & DW2 (Sebahagian PTD 2423), Jalan Tanjung A/2, Pelabuhan Tanjung Pelepas, Mukim Tanjung Kupang, Daerah Johor Bahru, Johor Darul Ta'zim' ('project') for the contract sum of RM136,300,000.

[6] The date of commencement of the Works is 15 February 2017 and the completion date shall be on or before 15 May 2018. By way of a supplemental agreement dated 15 May 2018, the parties agreed, among others, to revise the completion date for the whole of the works to 15 August 2018.

[7] The standard form contract applicable is the Agreement and Conditions of PAM Contract 2006 (Without Quantities) with some amendments to the articles of agreement ('AoA') and conditions of contract ('CoC'). According to article 7(q) of the AoA as amended, the contract or contract documents comprise of the LoA; AoA; CoC; Amendments, Amplifications and Supplementary Clauses to the AoA and CoC; particular specifications; contract drawings; contract bills; and other documents incorporated in the contract documents unless expressly stated to be excluded therefrom ('contract').

[8] PALI's Superintending Officer ('SO') issued the certificate of practical completion ('CPC') on 30 November 2018 certifying that the Works were satisfactorily completed on 23 October 2018 with minor outstanding works and defects as per the lists enclosed with the CPC, which shall be completed and make good on or before 31 December 2018 as committed by JEKS via its undertaking letter dated 30 November 2018 ('undertaking letter').

[9] On 7 March 2019, the SO issued the certificate of taking over ('CTO') pursuant to cl 39.0 CoC stating, inter alia, that the minor outstanding works are to be accomplished on or before 29 May 2019, the site and Works were taken over by PALI on 7 March 2019 and the defects liability period ('DLP') shall commence from 7 March 2019 and end on 6 September 2020.

[10] JEKS claimed that it has completed the Works but PALI failed to make payments to JEKS. Consequently, JEKS's Managing Director ('MD') issued a payment claim dated 19 April 2019 pursuant to s 5 of the CIPAA for unpaid certified works done based on interim payment certificates Nos 19 to 23 including release of one half of the retention sum, late payment interest and variation works up to interim payment certificate No 23 and progress claim ('PC') No 24 amounting to RM20,941,849.43.

[11] PALI issued its payment response dated 3 May 2019 through its solicitors, Messrs Tan Swee Im, Siva & Partners. PALI disputed the entire payment claim and crossclaimed against JEKS for liquidated damages ('LD'), penalties for external and infrastructure works, and health, safety and environment non-compliance, defects, maintenance and service works and non-compliance records.

[12] JEKS submitted its notice of adjudication on 14 May 2019. The adjudication claim, adjudication response and adjudication reply were accordingly issued on 15 August 2019, 12 September 2019 and 25 September 2019, respectively.

[13] On 25 November 2019, the adjudicator made a determination in favor of JEKS as quoted in verbatim below:

> 128 ...
>
> (a) that the Respondent is to pay the Claimant the sum of *RM 8,782,677.03* within 30 calendar days after receiving this adjudication decision;
>
> (b) that the Respondent is to in addition by the Claimant simple interest at the rate of 7.75% per annum on the sum of RM 8,782,667.03 from the date of this decision until the date of full realisation;

(c) that the Respondent is to bear the costs of these proceedings amounting to RM161,289.00, and that the Claimant is to settler any outstanding part of this sum of within 30 calendar days after receiving this adjudication decision; and

(d) failing payment by the deadline in sub-paragraph (c) above, the Claimant shall pay the Respondent simple interest calculated at 5% per annum for the overdue payment until the date of full realisation; and

(e) the payments under sub-paragraphs (a) to (d) above are to be made by cheque, banker's cheque or online transfer of funds into the Claimant's bank account.

[14] Subsequent to PALI's solicitors' letter to the adjudicator dated 10 January 2020, the adjudicator issued his corrected adjudication decision on 13 January 2020 whereby the adjudicated sum was reduced from RM8,782,677.03 to RM8,512,737.03.

(A) OS NO WA-24C-13–01 OF 2020: SETTING ASIDE APPLICATION

[15] Originally, PALI sought to set aside the AD on all four limbs of s 15 of the CIPAA which provides as follows:

15 Improperly Procured Adjudication Decision

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

(a) The adjudication decision was improperly procured through fraud or bribery;

(b) There has been a denial of natural justice;

(c) The adjudicator has not acted independently or impartially; or

(d) The adjudicator has acted in excess of his jurisdiction.

[16] However, on the date of hearing of the applications, Mr Sivabalan who appeared for PALI, had withdrawn the ground of challenge against the AD based on limb (c) of s 15 of the CIPAA.

[17] I shall now discuss the issues raised in respect of the remaining limbs of s 15 of the CIPAA.

First Ground: Whether the AD was improperly procured through fraud of JEKS pursuant to s 15(a) of the CIPAA by submitting fraudulent warranties to PALI in order for PALI to release the first moiety of the retention sum

PALI's submissions

[18] According to PALI, JEKS had, vide the undertaking letter, agreed and undertook that the first moiety of retention sum shall be released upon, among others, the submission of as-built drawings including the warranties as listed in the *Document Required for CPC* by 31 December 2018.

[19] However, PALI alleged that JEKS had acted fraudulently by misleading the SO into believing that the warranties submitted were genuine when they were not. PALI said that it and/or the SO discovered the fact that the warranties submitted by JEKS were not the actual warranties sighted and executed by the joint supplier, subcontractor and/or specialist in May 2019. As a result, the SO revoked the release of the first moiety of retention sum amounting to RM3,407,500 vide his letter dated 18 June 2019.

[20] The issue of fraudulent warranties was raised by PALI in the adjudication response but JEKS purportedly did not dispute the remarks made by the joint supplier, subcontractor and/or specialist and offered no justification or explanation in the adjudication reply. Although the adjudicator recognised that the evidence is conflicting, he did not invite JEKS to comment on the said remarks and failed to refer to the warranties' authentication produced by PALI and proceeded to allow JEKS's claim for the release of the first retention sum.

[21] PALI contended that the AD was procured through JEKS's fraud and JEKS is in breach of s 15(a) of the CIPAA and therefore, the AD should be set aside.

JEKS's submissions

[22] JEKS submitted that the defence of alleged fraud by PALI was raised during the adjudication proceedings and dealt with by the adjudicator in paras 37–41 of the AD. As such, PALI's complaint relates to the findings of fact or weight attached to the evidence by the adjudicator and it is settled law, with reference to the decision in *Euroland & Developments Sdn Bhd v Tack Yap Construction (M) Sdn Bhd and other appeals* [2018] MLJU 1453, that such complaints do not warrant a setting aside of an adjudication decision.

The findings of the court

[23] Subpara 17.3 of the LoA states that 'As a condition precedent to the issuance of Certificate of Practical Completion, you are required to submit the as-built drawings, operation manuals, warranties and the handover checklist duly filled and signed off by the relevant parties called in the Contract'.

[24] In the undertaking letter to the SO (exh 'LWY11' of the affidavit in support ('AIS'), Vol 16 affirmed by Mr Lam Wee Yeow, Director of Pan Asia Logistics Investments Pte Ltd, a company duly incorporated in Singapore and a subsidiary of Pan Asia Logistics Investments Holdings Pte Ltd whereby PALI is wholly owned by the latter company, at p 5709, encl 26), JEKS's MD wrote that:

> In consideration of the certificate of practical completion is issuing pursuant to Clause 15.2(b)(i) of the Conditions of Contract, we hereby agree and undertake as follows:
>
> 1. To make good and complete the defects and outstanding works listed in the CPC Outstanding Works (2 pages) to the satisfaction of the S.O. on or before 31st December 2018.
> 2. To submit the as-built drawings including the building survey plans, operation and maintenance manuals, warranties and handover checklist listed in Document Required For CPC (2 pages) by 31st December 2018.
> 3. Further, the 1st moiety of retention sum shall be released upon the compliance of Item 1 and Item 2 as the abovementioned.
>
> ...

[25] On 18 June 2019, the SO wrote to JEKS (exh 'LWY12' in AIS, Vol 16 at pp 5711–5712, encl 26), with reference to, among others, the CPC and undertaking letter, and further as follows:

> ...
>
> We wish to record that you have failed to comply with the conditions stipulated in you undertaking letter (item D) and Certificate of Taking Over (item A). It is under this same undertaking, furnished by you, that both conditions are to be met for the release for the ... (CPC) (item C). The site was subsequently taken over from you in bona fide that you will comply with the given conditions.
>
> We recall your refusal to have the warranties signed on both pages, little did we realise (only until very recently, from the Employer's probe, that we found invalid warranties — Attachment E) that you have misled us to believe that all the warranties were indeed genuinely completed. This is a violation to your undertaking letter.
>
> ...
>
> In view that the 1st half of the Retention Fund was released due to misleading undertaking made by you, we hereby revoke our certification for such release of the retention sum and the conditions for the said release of the same shall be reinstated.
>
> The aforesaid retention sum will be released to you upon the condition precedent having been fully complied with.
>
> ...

[26] In response to JEKS's claim for outstanding payment pursuant to the IPC in the amount of RM11,820,169.69, PALI raised the issue of breaches by JEKS which led to the revocation of the release of the first moiety of the retention sum as can be seen in para 17 of the adjudication response (exh 'LWY5', AIS, Vol 9, pp 3280–3283, encl 14), an excerpt of which is re-produced below:

> 17.1.1 The Respondent found out that the warranties signed by the following are invalid and not authentic.
>
> (a) BRC Trading Company — Only supplied the tile adhesive. The warranty provided only limited to the replacement of materials if proven defects resulted from the quality of adhesive materials supplied.
>
> (b) SYS Holding Sdn Bhd — The warranty is null and void.
>
> (c) Fast Flow Malaysia Sdn Bhd – The contract signed with the Claimant did not include the maintenance and siphonic systems are maintenance free.
>
> (d) KL Lai Engineering & Construction Sdn Bhd — The warranty and scope are invalid as the warranty provided only valid for one year from the date of practical completion of the premises.
>
> 17.1.2. Based on the above, the warranties submitted by the Claimant is void this is a breach of express terms of the Contract that requires the Claimant to provide valid warranties.
>
> 17.1.3. Such breach of undertaking was done knowingly with an intent to defraud the Respondent. The intent to defraud can be seen from the Claimant's refusal to have the warranties signed on both pages despite the requests from the Respondent. The chronology of the request and the Claimant's refusal is as follows:-

Date	Event
29.1.2019	By email, the QS has required the Claimant to get the original warranties to be initialled and stamped with company stamp at every page by the Claimant and the joint supplier and/or sub-contractor and/or specialist.
	The Claimant has replied to the QS, noted on the instruction and will proceed to seek the management decision
30.1.2019	The QS has requested the Claimant to arrange the authorised personnel from the supplier and/or sub-contractor and/or specialist to initial every page of the warranties at AQS's office between 7.2.2019 to 15.2.2019.
14.2.2019	The QS has checked with the Claimant whether there are any authorised personnel to initial the warranty.
	The Claimant alleged that it is an afterthought and enquired the reason to have the initials.
	The Respondent replied on the even date that it is a standard practice and strongly believe that it is not difficult to contact the supplier and/or sub-contractor and/or specialist to have all pages signed.

[27] I have also perused the adjudication teply, in particular paras 6–9 (exh 'LWY6', Vol 13, pp 4776–4777, encl 22), and I find that JEKS had submitted that it is not open to PALI to dispute that the Works have not achieved practical completion when the CPC and CTO have been issued. It was additionally submitted that all necessary documents have been provided to PALI and with respect to the warranty, JEKS stated as follows:

> 9. ... only one warranty that is outstanding from the Claimant's subcontractor, ie Seng Yong Seng Holding Sdn Bhd ('Seng Yong Seng'). The Claimant states that Seng Yong Seng refused to sign the necessary warranty due to non-payment issue. The Claimant further states that this non-payment issue was as a direct result of the Respondent's failure to make payment of sums that have been certified since September 2018. The Claimant refers to its letter dated 5.7.2019 at Schedule 39 of CBD.

[28] The adjudicator had addressed the issue as to whether JEKS is entitled to its claim for works done and certified but remain unpaid in the sum of RM11,820,169.69 as Issue No 1 in paras 35–42 of the AD. In the course of his deliberations, the adjudicator made the following remarks and findings:

> 39. ...
>
> (b) ...
>
> No particulars of the invalid warranties, outstanding as-built drawings, inspection forms, outstanding NCRs, outstanding defects, and sprinkler pipe burst incident were provided. The SO's letter is to me unsupported with contemporaneous evidence and I am thus unable to attach any significant weight to it and thus unable to accept that there has been a valid revocation of the part of interim payment certificate no. 23 releasing the first moiety of the retention sum.
>
> (c) The email thread refers to the requirement to have each page in the warranties (already submitted) to be initialled.
>
> This appears to me to be a formality, and there is no mention of fraudulent and not genuine warranties or any invalid or not authentic warranties. This email evidence alone carries little or no weight for me.
>
> 40. In support of its position, the Claimant has adduced evidence of a list of documents submitted for CPC which was also countersigned by the SO dated 19.02.2019. This countersigned list includes references to the: outstanding Seng Yong Seng Holding Sdn Bhd warranty and the outstanding signature on every page; as-built drawings being done, hard copies of inspection forms being ready (pending scan to CD), closure of all NCRs, and closure of defects list.
>
> 41. On the facts, it is apparent that the evidence between the parties is contradictory. Since it is the Respondent that claims entitlement to withhold the retention sum, the burden of proof is on the Respondent to demonstrate so. Based on the evidence before me however, I am not convinced that the Respondent is entitled to withhold the retention sum as the Respondent has failed to discharge the burden of proof. Furthermore, the fact that both the CPC and CTO have neither been retracted nor revised by the SO, by implication, the issuance of the certificates

indicated that the outstanding and/or defective works (if any) are only minor in nature and do not entitle the Respondent to withhold the retention sum.

[29] Based on the AD, the adjudicator has clearly dealt with the defence raised by PALI in respect of the warranties. The adjudicator held the view that, since it was PALI who contended that it is entitled to withhold the retention sum, the burden is on PALI to demonstrate the same. The adjudicator found, as a matter of evidence, that PALI failed to discharge this burden of proof. In this regard, the court cannot set aside the AD on the ground that the adjudicator has made an erroneous assessment of the evidence before him, there is an error as to his findings of fact and/or he has omitted to make a finding of fact which can be adequately supported by the evidence.

[30] This case is akin to *Euroland* in the sense that the adjudicator in both cases had considered the defences raised and found them wanting or unsubstantiated and thus rejected them. The High Court in *Euroland* held that matters such as the weight to be attached to certain evidence or that the adjudicator had failed to judicially appreciate certain arguments do not concern the requirement of the rules of natural justice that a party has the right to be heard but rather as going to the merits of the case. It is well established that in this setting aside application, the court cannot review the merits of the AD (see the decision of the Court of Appeal in *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776).

[31] However, the court recognises that PALI's first ground of challenge on the issue of fraudulent warranties is not premised on limb (b) of s 15 of the CIPAA but rather on limb (a). In its submission, PALI relied on the case of *PBS Energo AS v Bester Generacion UK Ltd* [2020] 4 All ER 1101; [2020] EWCA Civ 404 where the Court of Appeal referred to the formulation by Akenhead J in *SG South Ltd v King's Head Cirencester LLP and another* [2009] EWHC 2645 (TCC) as to the approach to be applied when allegations of fraud are raised by the respondent in an application by an applicant for summary judgment to enforce the decision by an adjudicator.

[32] As at the date of hearing and decision of the setting aside application, the only Malaysian case on s 15(a) of the CIPAA and where the judgment in *SG South* was cited is *Gumi Asli Elektrikal Sdn Bhd v Dazzling Electrical (M) Sdn Bhd and another case* [2020] MLJU 314; [2020] 1 LNS 189.

[33] At the time of writing these grounds of judgment, this court has delivered the full reasons for the decision in the case of *KPF Niaga Sdn Bhd v Vigour Builders Sdn Bhd and another case* [2021] MLJU 229; [2021] 1 LNS 141. In that case, this court was guided by the propositions as expounded in *SG*

South and followed by the High Court in *Gumi Asli Elektrikal* in construing the word 'fraud' in s 15(a) of the CIPAA. *LWY6 Elektrikal* and *SG South* were discussed in the following excerpt from the grounds of judgment in *KPF Niaga*:

> [58] Unlike limbs (b) and (d) under s 15 CIPAA where there is an ever-growing collection of Malaysian cases, the only known decision on limb (a) is *Gumi Asli Elektrikal*. In that case, the High Court was confronted with the issue of whether the adjudication decision had been improperly procured through fraud when (i) Dazzling Electrical (M) Sdn Bhd ('Dazzling') purportedly misrepresented to Gumi Asli Elektrikal Sdn Bhd ('Gumi') that Dazzling would withdraw the adjudication material facts from the Adjudicator in the form of two letters. With regards to (ii), the Court decided that it could not allow Gumi to rely on the two letters as these were not exhibited in Gumi's affidavit. As for (i), the court held, among others, that there was no documentary evidence to support the alleged misrepresentation; no fraud had been committed by any party as explained in *SG South*; and even if fraud had been committed, Gumi had failed to prove that the adjudication decision had been improperly procured through fraud.
>
> ...
>
> [60] The relevant passages from the judgment by Akenhead J in *SG South*, with my added emphasis, read as follows:
>
> > 20 Some basic propositions can properly be formulated in the context albeit only of adjudication decision enforcements:
> >
> > (a) Fraud or deceit can be raised as a defence in adjudications provided that it is a real defence to whatever the claims are; obviously, it is open to parties in adjudication to argue that the other party's witnesses are not credible by reason of fraudulent or dishonest behaviour.
> >
> > (b) *If fraud is to be raised in an effort to avoid enforcement* or to support an application to stay execution of the enforcement judgement, *it must be supported by clear and unambiguous evidence and argument*.
> >
> > (c) *A distinction has to be made between fraudulent behaviour, acts or omissions which were or could have been raised as a defence in the adjudication and such behaviour, acts or omissions which neither were nor could reasonably have been raised but which emerge afterwards*. In the former case, if the behaviour, acts or omissions are in effect adjudicated upon, the decision without more is enforceable. *In the latter case, it is possible that it can be raised* but generally not in the former.
> >
> > (d) Addressing this latter case, one needs to *differentiate between fraud which directly impacts on the subject matter of the decision and that which is independent of it*. Examples of the first category are where it is later discovered that the certificate upon which an adjudication decision is based is discovered to have been issued by a certifier who has been bribed or by a certifier who has been fraudulently misled by the contractor into issuing the certificate by a fraudulent valuation. Examples of the second category are fraud on another contract or

cross claims arising on the contract in question which can only be raised by way of set off or cross claim. Whilst *matters in the first category can be raised*, generally those in the second category should not be. The logic of this is that it is the policy of [HGCRA] that decisions are to be enforced but the Court should not permit the enforcement directly or at least indirectly of fraudulent claims or fraudulently induced claims; put another way, enforcement should not be used to facilitate fraud*; fraud which does not impact on the claim made upon which the decision was based should not generally be deployed to prevent enforcement.*

21 In formulating and applying these propositions, courts need to be aware and take into account what goes on construction sites up and down the country. On numerous occasions, contractors and subcontractors and even consultants will submit bills or invoices which are or are believed by the recipient to overstate the entitlement. Whilst there are some 'cowboy' and fraudulent builders who prey on the public, it will only rarely be the case that one can presume fraud to have taken place where an invoice or bill is overstated. The claiming party may believe that it is entitled to what it is claiming; there may be a simple and honest mistake in the formulation of the claim; the claim may be based on a speculative but arguable point of law or construction of the contract. In none of these cases can it be said that there was fraud on the part of the claiming party. *The Court should be astute and cautious on adjudication enforcement applications in assessing pleas of fraud by the party against whom the adjudication decision has been made*. I doubt very much whether there will be any significant number of challenges to enforcement on the basis of fraud.

[61] Wong Kian Kheong J expressed His Lordship's view as to the scope of the court's power under s 15(a) CIPAA in the following terms:

[15] ...

(1) a party (X) applying to set aside an AD on the ground that the AD has been improperly procured through fraud under s 15(a) CIPAA has to prove the following two matters cumulatively —

(a) fraud has been committed. In this respect, the fraud in question need not be committed by the party in whose favour the AD is given (Y). Section 15(a) CIPAA does not require fraud to have been committed by the adjudicator. Nor is it required to be proven that Y or the adjudicator is complicit in the fraud; and

(b) the AD has been 'improperly procured' through fraud, either directly or indirectly. On the wording of s 15(a) CIPAA, even if X can prove the commission of fraud but if X cannot prove that an AD has improperly procured through fraud, the court should not exercise its discretion to set aside the AD. Having said that, if fraud has been committed, the court should not exercise its discretionary power to grant leave to Y to enforce the AD under s 28(2) CIPAA ...;

(2) ...

In construing the word 'fraud' in s 15(a) CIPAA, I accept the above judgment by Akenhead in *SG South*;

(3) X has the legal burden to satisfy the court that an AD has been improperly procured through fraud. Y has no legal onus to prove that the AD has not been improperly procured through fraud; and

(4) X is only required to prove that an AD has been improperly procured through fraud on a balance of probabilities (not beyond all reasonable doubt) — please see the Federal Court's judgment delivered by Richard Malanjum CJ (Sabah and Sarawak) (as he then was) in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 1 MLJ 1, at [48]–[53].

[62] Section 17 of the Contracts Act 1950 [Act 136] ('CA 1950') describes the acts that could be committed by a party to a contract or by his agent so as to amount to 'fraud' and which renders a contract voidable under sub-s 19(1) at the option of the party whose consent was caused by such fraud. However, for purposes of s 15(a) CIPAA, 'fraud' has a distinctive meaning as compared to the definition in the context of contract law as set out in s 17 CA 1950. In the circumstances, this Court is very much assisted by the legal principles as propounded in *SG South* which can be applied to the present application.

[34] It is indisputable that the fraudulent behavior or acts raised by PALI in the setting aside application fall under the category of fraudulent behavior or acts which were raised as a defence in the adjudication proceedings and was adjudicated upon by the adjudicator. In such circumstances, the AD would, in general, be enforceable. The court is also mindful of the reminder in *SG South* of the need to be alert and vigilant when assessing claims of fraud made by PALI being the party against whom the AD was made.

[35] Furthermore, under s 15(a) of the CIPAA, the burden is on PALI to prove, on a balance of probabilities, that the AD has been improperly procured through fraud by way of clear and unambiguous evidence. If PALI is able to discharge this burden of proof, the court would then be likely to exercise its discretion in not allowing JEKS to enforce the AD since, as submitted by PALI, the court should not be used as a medium to uphold an adjudication decision which is proven to be tainted with fraudulent acts by the successful party in the adjudication proceedings.

[36] The question which now needs to be answered is whether PALI has discharged the abovesaid burden of proof. I have perused PALI's standard forms for 'Warranty authentication for PALI PTP2' all dated 3 May 2019 wherein PALI has enclosed the joint warranty between JEKS and the respective companies seeking confirmation by the latter of the details, scope and duration of warranty, and the other documents shown in exh 'LWY13', Vol 16, pp 5713–5718, encl 26 (these constitute *Attachment E* in the SO's letter to JEKS dated 18 June 2019), and my findings are as follows:

(a) on 6 May 2019, the representative of BRC Trading Company ('BRC') did not indicate in the box provided on the form as to whether the warranty and scope are correct and valid or otherwise. Instead, a handwritten note states that 'We are only supply of tile adhesive. (Pls refer to the attachment). TQ'. The attachment is a letter from BRC to JEKS dated 5 September 2018 and having read the same, I am of the view that this evidence does not establish that JEKS has committed fraud in respect of the warranty for the tiling works since all that BRC has said is that as a supplier of the tile adhesive, it sought JEKS's agreement to indemnify BRC for any claim for costs and expenses arising from issues which are unrelated to the quality of the adhesive supplied. BRC additionally placed on record that '... if proven defects resulted from quality of the adhesive supplied, the compensation from BRC ... is limited to replacement of materials as per attached manufacturer's warranty'. JEKS has indicated its agreement and acknowledgement to the contents of the letter by signing and placing the company stamp on 5 September 2018;

(b) the representative of SYS Holding Sdn Bhd ('SYS') had, on 6 May 2019, indicated in the box on the form that 'The warranty and scope are not correct and invalid' and stated the reason as 'Our Warranty is null and void due to payment not received in Full after work completed (Not including Retention)'. It seems to me that SYS's justification for the warranty being purportedly invalid involves a disagreement between JEKS and SYS on the issue of payment for the works and does not amount to intentional conduct by JEKS to provide fraudulent warranties to PALI;

(c) at p 5716 of encl 26, the first page of the 'Warranty For Siphonic Rainwater Drainage System' made on 15 August 2018 between JEKS and Fast Flow Malaysia Sdn Bhd ('Fast Flow') with the handwriting at the top right-hand corner 'original signed doc.' is shown. Recital 2 of the said Warranty states that 'By an agreement dated the 15th AUGUST 2018 made with the Contractor, the Specialist has agreed, inter alia, to supply and install Siphonic Rainwater Drainage System (hereinafter called 'the Specialist Works')'. Beside this recital, there is a handwritten note stating that 'original signed document from JEKS'. At p 5717, what appears to be a similar first page of the Warranty is exhibited with the handwriting at the top right-hand corner 'current copy received for authentication' and Recital 2 which reads (with my added emphasis) 'By an agreement dated the 15th AUGUST 2018 made with the Contractor, the Specialist has agreed, inter alia, to *design*, supply, install, *complete and maintain* Siphonic Rainwater Drainage System (hereinafter called 'the Specialist Works')'. The handwritten notes beside Recital 2 state 'not in original signed document' and 'Note: our contract did not include maintenance and siphonic systems are maintenance

free'.

To my mind, PALI is relying mainly on the warranty with Fast Flow in contending that JEKS had acted fraudulently with the intention to mislead the SO and PALI as evident from subpara 17.1 in the adjudication response which states 'The SO found that the warranties submitted by the Claimant was fraudulent and not genuine, ie the executed warranties are not the actual warranties sighted and executed by the joint supplier and/or sub-contractor and/or specialist.' and paras 50 and 53 of PALI's Written Submissions dated 19 May 2020.

However, as abovementioned, only two different versions of the first page of the 'Warranty For Siphonic Rainwater Drainage System' was exhibited without any covering letter from Fast Flow and neither is there an affidavit affirmed by an authorised representative of Fast Flow to explain these pages of the Warranty and who made the handwritten remarks. It is opportune to mention that there are also no affidavits from the other companies to the effect that the warranties were falsely procured by JEKS; and

(d) on 4 May 2019, the representative of KL Lai Engineering & Construction Sdn Bhd had indicated in the box on the form that 'The warranty and scope are not correct and invalid.' and stated the reason as 'The Warranty Period only valid for one year from the date of Practical Completion of the Premises'. In my opinion, this is a matter which goes to the duration of the warranty and does not tantamount to a fraudulent warranty.

[37] Following from all of the above given reasons, this court concludes that PALI has not discharged the onus of proving fraud committed by JEKS in obtaining the AD on the standard of proof of a balance of probabilities.

Second ground: Whether there has been a denial of natural justice to PALI pursuant to s 15(b) of the CIPAA

[38] The learned counsels representing both parties are no strangers to the multifarious suits that can be pursued under CIPAA. Being familiar with the case authorities which have discussed the notion of natural justice in the context of a s 15(b) of the CIPAA application, the legal principles that can be derived from the selection of cases which the counsels have chosen to submit in the instant case, namely *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC); *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260; *ACFM Engineering*; *Euroland*; *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 and *Guangxi Dev & Cap Sdn Bhd v Sycal Bhd* [2018] MLJU 1542; [2019] 1 CLJ 592 can be summarised as follows:

(a) the principles of natural justice are concerned with the provision of a fair hearing to contending parties and requires the adjudicator to hear both sides on an issue or matter in dispute and arrive at a reasoned decision;

(b) the adjudicator is obligated to consider all defences raised by a respondent in the adjudication response;

(c) a party who is dissatisfied with the decision on its merits cannot use the principles of natural justice to have the decision set aside. The court cannot be asked under cover of an allegation of breach of natural justice to review the merits of the adjudicator's decision; and

(d) any breach of natural justice must not be peripheral but must be a material breach affecting the outcome of the resolution of the dispute. In determining this question, what needs to be considered is whether there was a real possibility of a different conclusion.

[39] In the OS, PALI pleaded that the adjudicator had breached the rules of natural justice based on three broad grounds that he has failed to give reasons and to consider PALI's submission or give proper weight to its evidence and he has gone on a frolic of his own in respect of certain issues.

[40] The specific issues raised by PALI under each of the above said broad grounds are considered in more detail below.

Subground (a): Whether the adjudicator failed to give a reasoned decision

[41] Subsection 12(4) of the CIPAA provides that 'The adjudication decision shall be made in writing and shall contain reasons for such decision unless the requirement for reasons is dispensed with by the parties'. This requires, at a minimum, for the adjudicator to give a statement of his reasons in arriving at the conclusion as he did. The reasons may be simple and succinct, but they must be coherent so that a reasonable reader can understand the reasoning in respect of each issue that require his determination. The reasons may be wrong in fact or in law but that does not give rise to an effective challenge under limb (b) of s 15 of the CIPAA. Failure to explicitly deal with a substantial element of the defence raised by the respondent in an adjudication proceeding may render the adjudication decision liable to be set aside (see, among others, *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd* [2009] EWHC 2218 (TCC); *Thermal Energy Construction Ltd v AE & E Lentjes UK Ltd (2010)* [2009] EWHC 408 (TCC); *Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873; and *Genting Malaysia Berhad v PLM Interiors Sdn Bhd and another case* [2020] MLJU 344).

[42] PALI's complaints as to the alleged failure by the adjudicator in providing a reasoned decision relate to two issues concerning extension of time ('EoT') as discussed below. JEKS had contended that there were nine delay events which entitled JEKS to EoT for the period of 121 days. On the other hand, PALI claimed that it was entitled to impose LD in the sum of RM10.7m.

(i) Granted ten days for JEKS's application for EoT to change the existing interlocking tiles to concrete driveway with traffic marking start from entrance Guard House 2 to Gridline 21

[43] PALI's first complaint is that the adjudicator did not provide a reasoned decision as to why and how PALI has caused ten days of delay in respect of SO's Instruction No 55 issued on 26 October 2018 to change the interlocking tiles finish at the entrance of the Guard House No 2 to Gridline 21 to concrete driveway. According to PALI, the adjudicator failed to consider the matter as to whether JEKS has successfully identified that the said event has interrupted the schedule and programme of works and/or the actual progress of the works; the event was on the critical path of the Works; and the event was a dominant delay.

[44] JEKS referred to paras 69(h) and 70 of the AD, in justifying that the adjudicator had indeed provided his reasons on this issue. The relevant excerpt from the AD is as follows:

> 69. I have studied the Claimant application for EOT. The Claimant contends that there were nine (9) delaying events that entitle the Claimant to EOT for the period of 121 days. I address these delaying events in turn below:
>
> ...
>
> (h) Conversion of interlocking tiles to concrete driveway at GH2
>
> ...
>
> Having given this delaying event due consideration, in terms of causation *I accept the Claimant's claim* in principle for 10 days delay attributable to the Respondent.
>
> ...
>
> 70. By reason of the matters stated in paragraph 69 above, I can only accept that the *Respondent has caused 10 days* of delay in principle for conversion of interlocking tiles to concrete driveway at GH2. The variation instruction for this was issued on 26.10.2018. The notice of intention to claim was issued vide the Claimant's letter dated 23.11.2018, and to me, just satisfying the requirements of Clause 23.1(a) of the Contract. The final claim for EOT was issued vide the Claimant's letter dated 21.12.2018, and to me, also just satisfying the requirements of Clause 23.1(b) of the Contract.
>
> Accordingly, *I find that the Claimant is entitled to 10 days EOT under the Contract.*.

[45] In view of para 70 in the AD, which PALI conveniently omits to mention in its submission, it is crystalline that PALI's challenge against the AD

on this ground is entirely baseless. The reasons, brief as they may be, are nonetheless the adjudicator's justification in allowing JEKS' application for EoT of ten days. The correctness or otherwise of the findings by the adjudicator, in fact and/or in law, is not a matter that can be examined by this court.

(ii) Reduced a further five days for *gazetted* public holidays in the sum of RM900,000 for LD

[46] Article 7(w) of the AoA defines the word 'Day' to mean '... calendar day including the weekly day of rest but excluding *gazetted* holidays in the location where the Works is carried out;'. In para 46 of the adjudication claim, JEKS stated that the basis of the SO's and/or PALI's calculation of the alleged LD is incorrect as the *gazetted* holidays for the State of Johor, being the location of the Works, ought to be excluded from the computation of LD. JEKS had identified five days as the *gazetted* holidays in Johor for the period between 22 August 2018 and 16 September 2018.

[47] In paras 59–61 of the adjudication response, PALI pointed out that the parties had made an amendment to Appendix Item 9 where the word 'per Day' was substituted with the word 'per calendar day' such that the LD is to be calculated at the rate as stipulated in the LoA per calendar day. This amendment is said to reflect the intention of the parties to include the *gazetted* holidays in the calculation of the LD.

[48] PALI's second criticism is that the adjudicator has failed to give cogent reasons as to why he accepted JEKS's arguments over PALI's and which five days are reduced in the calculation of LD for being the *gazetted* public holidays. This, argued PALI, indicates that the adjudicator has not dealt with this issue at all and thus caused substantial prejudice to PALI.

[49] Contrary to PALI's submission, I am of the opinion that the adjudicator had provided the justification in arriving at his finding as can be seen in para 71 of the AD. Furthermore, since the only *gazetted* holidays raised by JEKS in subpara 46(c) in the adjudication claim are for five days, the five days reduction in the calculation for LD as decided by the adjudicator must relate to the same five days for *gazetted* holidays. For ease of reference, para 71 of the AD is set out below:

> 71. Based on my findings in paragraph 69 above, the Respondent's claim for LD has to be reduced by the sum of RM 1,8000,000.00 (10 days x RM 180,000.00). This leaves the Respondent's reduced claim for LD at RM 8,900,000.00. I also accept the Claimant's arguments that the LD claimed by the Respondent should be further reduced after taking into account public holidays. Based on my calculation, the LD claimed should be reduced a further 5 days for gazetted public holidays in the sum

of RM 900,000.00 (5 days x RM 180,000.00). This leaves the Respondent's further reduced claim for LD at RM 8,000,000.00.

[50] Therefore, I similarly find that PALI's challenge against the AD premised on the aforesaid ground is unmeritorious.

Subground (b): Whether the adjudicator failed to consider the plaintiff's submission or give proper weight to PALI's evidence on the following issues

(i) The revocation of the release of the first moiety of retention sum

[51] Apart from the fraudulent warranties as discussed earlier, the SO had also revoked the release of the first moiety of the retention sum on 18 June 2019 on the grounds that JEKS had breached the undertakings given in its letter dated 30 November 2018 and the conditions as stated in the CPC and CTO, namely:

(a) the joint warranties submitted by JEKS are fraudulent and although JEKS made no comments in the adjudication reply, the adjudicator decided that there are no particulars of invalid warranties. PALI contended that the adjudicator has failed to consider the warranties' authentication and replies made by the supplier, contractor and/or specialist;

(b) JEKS failed to provide the softcopies of all as-built drawings in PDF and DWG files, which should be attached to the operation and maintenance manuals files;

(c) JEKS failed to close the non-compliance records ('NCR'); and

(d) JEKS has more than 75% outstanding defect works and failed to provide the report on the sprinkler pipe burst incident.

[52] PALI submitted that it should not be faulted for the lack of particulars in the form of documents or contemporaneous evidence as it could only rely on the SO's letter stating JEKS's failure to provide the documents. To rebut this assertion, JEKS should have provided evidence that it has either submitted the documents and/or closed the NCR.

[53] PALI relied on s 25(i) of the CIPAA in asserting that the adjudicator should have inquisitorially taken the initiative to ascertain the facts and the law required for the decision.

[54] In rebutting PALI's arguments, JEKS referred to paras 37–42 of the AD which shows that the adjudicator had considered the positions taken by each party with regards to the issue of the first moiety of the retention sum before the

adjudicator recorded his findings in para 41 as quoted previously. These findings reflect the adjudicator's assessment of the evidence before him and the issue of burden of proof.

[55] The adjudicator was evidently not convinced with Pali's arguments surrounding the revocation of the first moiety of the retention sum and as such he found that JEKS '... is in principle entitled to its claim for works done and certified but remain unpaid in the sum of RM11,820,169.69' subject to PALI's entitlement to crossclaims/set off.

[56] Based on the AD, it is my considered view that the adjudicator has given proper and due consideration to the evidence and it is within his discretion to determine the weight to be accorded to each piece of evidence before him and to draw the necessary conclusions therefrom.

[57] PALI's complaints essentially relate to the weight of evidence given by the adjudicator. However, it is settled law that in an application to set aside an adjudication decision, it is not for the court to re-evaluate the evidence that has been submitted during the course of the adjudication proceedings. The AD cannot be set aside just because, among others, the adjudicator has failed to attach weight to relevant evidence, undue weight has been given by him to any piece of evidence and he has assessed erroneously the evidence presented to him (see *Naza Engineering & Construction Sdn Bhd v SSL Dev Sdn Bhd* [2020] 9 MLJ 499; [2020] 2 MLRH 436).

(ii) The variation works

[58] PALI's dissatisfaction arises from the purported failure by the adjudicator to consider and give proper weight to the invoices issued by five different companies (including Cahaya Engineering Works for the sum of RM23,700) submitted by PALI for certain items amounting to a total sum of RM506,310.80 being the costs expended by PALI in engaging third parties to carry out and complete the Works. PALI claimed that in relation to VO No 43 (with Superitending Officer's Instruction ('SOI')), it is entitled to a set off being an omission of RM808,929.10. Instead, the adjudicator only took into account the sum of RM374,560 as explained in para 56(aj) of the AD as follows:

> VO No 43
>
> VO No. 43 is for set-off by employer (housekeeping, damaged PTP cable, door and roof top carpark wall girth). The Claimant disputes this omission, whereas the QS' recommendation is for the sum of RM808,929.10 (omission) and the amount allowed for by the Respondent for this item is an omission in the sum of RM770,408.10 (based on the QS' earlier valuation).

In support of its recommendation the QS as adduced a breakdown with supporting documents. The supporting documents only indicate the sum of RM 374,560.00 for: cleaning and buffing works by Zacklim (RM230,000.00); wet and dry vacuum cleaners by Everlasting (RM4,400.00); and general and site cleaning by Eco Friend Cleaning (RM140,160.00).

The Claimant on the other hand contends that this work was unilaterally omitted by the Respondent's consultant. No other contentions have been advanced by the Claimant, except that it paid Cahaya Engineering Sdn Bhd for works carried out on behalf of the Respondent (which in any event, the Respondent has failed to prove that it has incurred the sum recommended by the QS). I have reviewed the terms of the Contract in particular Clause 11 (variations) and could find no prohibition in respect of unilateral omissions viz. variations. On the contrary, Clause 11 implies that instructions for variations (whether for addition or omission) can be unilateral. *I therefore find that the work can be unilaterally omitted*.

In the absence of any other particular evidence challenging the QS' recommendation, *I find the value of this variation to be in the sum of RM 374,560.00 (omission) for VO No. 43*.

[59] In its submission to this court, JEKS had additionally clarified that the sum of RM23,700 in respect of the invoice from Cahaya Engineering Works was actually paid by JEKS as evidenced by the documents in exh 'A4' of JEKS's affidavit in reply ('AIR', encl 29). The same documents were submitted in the course of the adjudication proceedings.

[60] In a nutshell, the adjudicator has considered all the evidence before him in finding that there was an omission in the sum of RM374,560 and PALI's objection is similarly premised on the adjudicator's assessment of the evidence which is not a ground to warrant the setting aside of the AD.

(iii) JEKS's application for EoT as stated in subground (a)(i) above

[61] PALI argued that the adjudicator has not given due and proper consideration and weight to its documents and submissions including SOI No 55 dated 26 October 2018 (exh 'LWY16' of the AIS, encl 2) which was to regularise the site instruction given on 10 October 2018. PALI took issue with the adjudicator's findings in para 70 of the AD that JEKS claimed for ten days EoT for the period between 12 October 2018 until 22 October 2018 and that the SOI could not be issued on 26 October 2018 as works had already been carried out before that date.

[62] In addition, PALI relied on cl 23.1(a) of the COC on 'Submission of notice and particulars for extension of time' in submitting that JEKS should give written notice of its intention to claim for EoT within 28 days from the date of the SOI, CSOI or the commencement of the event, whichever is earlier, if JEKS is of the opinion that the completion of the works will be delayed. As

A the event commenced on 10 October 2018, JEKS failed to comply with the notice requirement of 28 days because JEKS only submitted the notice on 23 November 2018. The 28 days calculated from 10 October 2018 would lapse on 7 November 2018. The adjudicator is therefore plainly wrong in deciding that JEKS has satisfied the requirements of cl 23.1(a) of the COC and is B entitled to ten days EoT.

[63] Finally, PALI contended that the adjudicator failed to consider its defence at para 47 of the adjudication response that JEKS had failed to C determine the extent of the delay, demonstrate the cause and effect of the delay event, provide the baseline master programme and submit all particulars of the cause of the delay. The resulting breach of natural justice is said not to be merely peripheral as the adjudicator has granted EoT of ten days to JEKS and reduced the LD amount by RM1,800,000.

D

[64] JEKS countered PALI's assertions by referring to its application for EoT No 1 vide letter dated 21 December 2018 wherein the 812 paged document and appendices in respect of 8 delay events and one other delay events, including Delay Event No 8 — SOI No. 55 with the completion date of 22 E October 2018, were attached (see exh 'LWY4' in PALI's AIS, encl 10, particularly pp 2381–2388 and 2410–2411). I have perused this exhibit and I find that in JEKS's document outlining its claim for EoT, JEKS stated that throughout the course of the construction progress, the Works were subject to a substantial degree of change and delays where a total of 55 SOI were issued up F to 30 November 2018 (see para 1.8 and subpara 1.8.1) and the background, basis of contract and delay analysis were provided in respect of each delay event including delay event No 8.

G **[65]** The justification put forth for the application with respect to Delay Event No 8 can be seen in para 2.8. In subpara 2.8.1(a), JEKS stated that SOI No 55 was issued by the SO on 26 October 2018, which was after the revised completion date of 15 August 2018. In subpara 2.8.2, JEKS explained the 'Basis of Contract' in the following terms:

H

a) Clause 2.0 of the COC states the requirement for the SOI to be in writing and expressly entitled 'Superintendent Officer's Instruction'.

b) The instruction to carry out the Works was issued by the S.O. via an expressly titled document that reads 'Superintendent Officer's I Instruction'. Hence, the format of SOI No. 55 is consistent with the COC requirement.

c) Clause 2.1 of the COC further requires for the Contract to *'... forthwith comply with all instructions issued to him by the Architect ...*'

d) It is an alteration or modification of the design, quality or quantity of the Works in accordance with Clause 11 of the COC and therefore, a Variation to the Contract.

[66] Under 'Delay Analysis', the impact as planned analysis was carried out with the conclusion that Delay Event No 8 impacts the Works by ten days.

[67] All the evidence as referred to above were before the adjudicator and judging from subpara 69(h) and para 70 of the AD, these had been taken into account by the adjudicator when he made the finding of fact that SOI No 55 was issued by the SO on 26 October 2018. Even assuming that the adjudicator had erred in his decision as to whether JEKS has satisfied the requirements of cl 23.1(a) of the COC, the court would be straying into the merits of the decision and treating the matter akin to being an 'appealable error' if the court was to accept PALI's contentions. I therefore conclude that this ground of challenge has not been established.

(iv) The reduction of LD as stated in subground (a)(ii) above

[68] PALI had raised the same issue on the reduction of LD by RM900,000 whereas by the amendment to Appendix Item 9, the parties had agreed that the rate of LD is to be calculated per calendar day. This time the issue is presented in the context of the adjudicator's alleged failure to give proper weight to PALI's submission. However, the court is not minded to accept PALI's argument for the same reasons as elaborated in the preceding parts of this judgment.

Subground (c): Whether the adjudicator went on a frolic of his own on the following issues

(i) Outstanding invoices for temporary usage of utilities in the sum of RM49,422.88

[69] In paras 104–107 of the adjudication response, PALI averred that JEKS had outstanding temporary usage utilities where PALI is entitled to set off from the sum due and payable to JEKS. PALI relied on its letter to JEKS dated 18 June 2019 wherein the former informed that 9 invoices dated 15 March 2018 until 1 December 2018 in the total sum of RM49,422.88 is outstanding.

[70] JEKS denied PALI's averments and stated that the said item does not fall under the express set off provision in the contract (see para 51 of the adjudication reply). It is observed that JEKS had raised a general defence to PALI's claims for set off by relying on cl 30.4 of the CoC which stipulates that:

30.4 The Employer shall be entitled to set-off all cost incurred and loss and expense where it is expressly provided under Clauses 2.4, 4.4, 5.1, 6.5(e), 6.7, 14.4, 15.3(b), 15.3(c), 15.4, 15.5, 19.5 and 20.A.3. No set-off under this clause may be made unless:

30.4(a) the Architect (on behalf of the Employer) has submitted to the Contractor complete details of their assessment of such set-off; and

30.4(b) the Employer or the Architect in his behalf has given the Contractor a written notice delivered by hand or by registered post, specifying his intention to set-off the amount and the grounds on which such set-off is made. Unless expressly stated elsewhere, such written notice shall be given not later than twenty eight (28) Days before any set-off is deducted from any payment by the Employer.

Any set-off by the Employer shall be recoverable from the Contractor as a debt or from any monies due or to become due to the Contractor under the Contract and/or from the Performance Bond.

If the Contractor after receipt of the written notice from the Employer or the Architect on his behalf, disputes the amount of set-off, the Contractor shall within twenty one (21) Days of receipt of such written notice, send to the Employer delivered by hand or by registered post a statement setting out the reasons and particulars for such disagreement. If the parties are unable to agree on the amount of set-off within a further twenty one (21) Days after the receipt of the Contractor's response, either party may refer the dispute to adjudication under Clause 34.1. The Employer shall not be entitled to exercise any set-off unless the amount has been agreed by the Contractor or the adjudicator has issued his decision.

[71] JEKS also cited the case authorities of *Dataran Rentas Sdn Bhd v BMC Constructions Sdn Bhd* [2008] 2 MLJ 856 and *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 in submitting to the adjudicator that PALI failed to comply with the necessary contractual requirements and thus, PALI could not avail itself to any right of set off.

[72] Mr Sivabalan argued that the adjudicator went off on a frolic of his own as he decided this issue upon a factual or legal basis which has not been put forward by either side. The adjudicator is said to have committed an error by assuming that the amounts claimed was not satisfied and PALI did not comply with cl 30.4(a) or (b) of the CoC. Further, PALI contended that the adjudicator should have invited PALI to address him on this issue before deciding on the same.

[73] The adjudicator dealt with this matter as Issue No 10 in paras 105–110 of the AD. The reasoning given by the adjudicator is in the following paras of the AD:

107. I have reviewed the terms of the Contract and find that in principle such claims by the Respondent can fall under Clause 4.4 of the Contract for charges which may arise from a 'Service Provider', ie for water, electricity, telephone, sewerage and other related services.

108. I have carefully considered the evidence adduced by the Respondent, and am not satisfied that it has incurred the amounts claimed for utilities consumed by the Claimant. Whilst the Respondent has generated several invoices to the Claimant for utilities, the invoices are not supported with source documents/evidence as to the quantities consumed and the rates applied. As this is the Respondent's crossclaim, the burden is on the Respondent to prove its entitlement. It is apparent to me that the Respondent has failed to prove that it has incurred the amount claimed or any part thereof.

109. Having carefully reviewed the evidence adduced by the Respondent, it is also apparent to me that neither the Clause 30.4(a) nor Clause 30.4(b) requirements have been complied with.

[74] Upon scrutiny of the adjudication pleadings and the AD, it is apparent that JEKS's defence to PALI's invoices is that Pali failed to comply with cl 30.4 of the COC and the adjudicator had accordingly made a finding that Pali is not entitled to crossclaim for the outstanding invoices. I am unable to fathom how PALI could contend that the adjudicator had decided on something that was not properly placed before him.

[75] Further, whilst s 25 of the CIPAA grants wide powers to the adjudicator, including the power under limb (i) as formerly alluded to, nevertheless it is ultimately the adjudicator's discretion as to whether he requires further submissions from the parties on a particular issue while bearing in mind that he is duty bound to deliver his decision according to the timeline as stipulated in sub-s 12(2) of the CIPAA. From the AD, it is clear that the adjudicator was able to decide on the issue without the need for any further submissions by the parties. At the risk of repetition, an erroneous finding of mixed fact and law by the adjudicator since this issue involved the interpretation and application of cl 30.4 of the CoC in a factual setting, is not a ground upon which this court can set aside the AD.

[76] In the upshot, I agree with JEKS that PALI has not established that the adjudicator has acted in breach of the rules of natural justice in the sense as laid down in *Cantillon*'s case by adjudicating the dispute upon a factual or legal basis which has not been argued or put forward by either side and without giving the parties an opportunity to comment, or where relevant, to put in further evidence.

(ii) The valuation for variation works

[77] PALI's next complaint on the ground that the adjudicator went on his own frolic relates to the adjudicator's decision in respect of seven of the individual variation claims which are tabulated below:

VO No	Para in the AD
12 (with SOI)	56(g)
16 (with SOI)	56(j)
20 (with SOI)	56(n)
23 (with SOI)	56(q)
23 (without SOI)	57(w)
31 (with SOI)	56(x)
47 (with SOI)	56(an)

[78] PALI submitted that the adjudicator has committed an error of law by assuming that the valuation rule in cl 11.6(d) of the COC applies for all the above stated items. Learned counsel for PALI highlighted the differences between the valuation rules in cl 11.6(c) and 11.6(d) of the COC in contending that the 7 VO items are not works that cannot be properly measured and valued and that cl 11.6(c) should apply in these circumstances whereby valuation shall be at fair market rates and prices determined by the SO

[79] PALI once again alleged that the issue of the applicability of cl 11.6(d) of the COC in the situation where the parties did not rely on the Schedule of Rates was not addressed by either party and as such, the adjudicator should have invited PALI to address him on this issue before making any decision.

[80] However, having perused the adjudication reply, I find that references have been made to cl 11.6(d) or cl 11.6 of the CoC in subparas 25(c), (e), (i), (n), (r), (t), (w) and (x) by way of JEKS's response to the items which were disputed by PALI. These subparas are in respect of AQS Nos 12, 16, 27, 31, 32, 43, 49 and 53.

[81] For purposes of this judgment, VO Nos 12 (with SOI) and 16 (with SOI) shall be analysed in more detail than the others as the same conclusion can be drawn based on the two illustrations.

VO No 12

[82] In subpara 25(c) of the adjudication reply, JEKS stated that:

> c. AQS No. 12 — Revise specification of gutter (AZ200 to AZ150) and omission of gutter at carpark roof and loading bay There are no documents in support of the

Respondent's consultation contention and neither was there an agreement by the Claimant with the Respondent's valuation. The Claimant denies that there was a costs saving of RM 22,717.50.

Further to this the value utilized by the Claimant is premised on the invoice issued by its supplier. The Claimant states that the rate AZ150 is not part of the contract and as such Clause 11.0(d) of PAM Contract applies. The Respondent's consultant has also instructed the Claimant that AZ150 has to be supplied by Duro Metal Industrial (M) Sdn Bhd and the Claimant refers to Schedule 41 of CBD.

[83] The adjudicator had meticulously dealt with each VO item and in so far as VO No 12 is concerned, this is what he had to say:

56. I will now delve into the individual variation claims (primarily with SO instructions), having regard to the contentions raised by the respective parties. As SO instructions have generally been issued for these variations, my focus here will therefore be on quantum for each variation, and generally not for liability which is not in dispute. ...

...

(g) VO No. 12:

VO No. 12 is in respect of revise specification of gutter and omission of gutter at carpark roof and loading bay. For this the Claimant contends that the value of the omission is in the sum of RM 100,389.20, whereas the QS and the Respondent have allowed for an omission of RM 280,402.50.

There are various sub-items in contention. In determining this VO, I am guided by Clause 11.6 of the Contract. It sets out the rules for valuing variations, and states as follows (extracts only):

The valuation of Variations ... shall be made in accordance with the following rules:

11.6(a) where work is of a similar character to, is executed under similar conditions as, and does not significantly change the quantity of work as set out in the Contract Documents, the rates and prices in the Schedule of Rates shall determine the valuation;

11.6(b) where work is of a similar character to work as set out in the Contract Documents but is not executed under similar conditions or is executed under similar conditions but there is a significant change in the quantity of work carried out, the rates and prices in the Schedule of Rates shall be the basis for determining the valuation which shall include a fair adjustment in the rates to take into account such difference;

11.6(c) where work is not of a similar character to work as set out in the Contract Documents, the valuation shall be at fair market rates and prices determined by the Architect;

11.6(d) where work cannot be properly measured and valued in accordance with Clause 11.6(a), (b) or (c), the Contractor shall be allowed:

A

11.6(d)(i) the daywork rates in the Schedule of Rates; or

11.6(d)(ii) where there are no such daywork rates in the Schedule of Rates, at the actual cost to the Contractor of his materials, additional construction plant and scaffolding, transport and labour for the work concerned, plus fifteen (15) percent, which percentage shall include for the use of all tools, standing plant, standing scaffolding, supervision, overheads and profit.

B

It appears there is no dispute in relation to the omission of the gutter to the rooftop carpark (RM 210,788.00) and loading bay (RM 46,897.00) as it is straightforward omission based on the items in the BQ. However, what is in dispute is how much should be added back to the Contract for the varied work installed.

C

The QS gives us a net omission of RM 22,717.50 for the varied work, on the premise that the gutter specifications have been reduced (ie lower specs). The net omission appears to me to be based on the QS' own evaluation of the quantity and rate affected by the variation.

D

It is important to note here that the QS does not rely on the 'Schedule of Rates' as referred to in Clause 11.6, neither does the Claimant. This is significant, as by deduction, this suggests to me that the work cannot be properly measured and valued with reference to the Schedule of Rates, leaving in effect Clause 11.6(d)(ii) to be the governing clause for this valuation on a cost plus 15% basis.

E

The Claimant's claim for the varied work is indeed higher than the original BQ work specified, despite the specification being reduced. In support of its claim the Claimant has produced an extract from its subcontract BQ for the same work (rate of RM 264.00 per meter run), and after applying a 15% mark-up provided for in Clause 11.6(d), the rate ends up being higher. The Claimant's quantity for this item is also higher.

F

Having given the evidence before me due consideration, the situation perhaps is a case of the Claimant taking the opportunity to revise unprofitable contract rates to profitable contract rates as a result of the variation. Although this seems unfair, Clause 11.6(d) is agreed to between the parties and it allows for the higher claim in principle by the Claimant despite the reduction in the specification. *I therefore accept the higher rate claimed by the Claimant.*

G

As to the quantity, the Claimant claims a higher quantity but it is a bare figure and unsupported by the evidence before me and thus remains unproven. *It herefore accept the QS' quantity of 1,165m* being the quantity for the varied work.

H

[84] The adjudicator's decision, which is quoted *in extenso*, clearly shows that the adjudicator allowed the rates relied by JEKS as JEKS had produced an extract from its subcontract BQ for the same work. Nevertheless, as submitted Mr Sanjay Mohan, in respect of the quantities, the adjudicator applied the QS's quantities. As such, the court is persuaded by JEKS's submission that there is no merits in PALI's argument that the adjudicator went on a frolic of his own.

I

VO No 16

[85] JEKS's position on this VO item is in subpara 25(e) of the adjudication reply as follows:

> e. AQS No. 16 — Revise Low-E Glass Skylight to contractor's approved proposed polycarbonate translucent sheet
>
> The Claimant states that the rates used by the Claimant is reasonable and has provided the progress claims submitted by its subcontractor. The Claimant states that this item falls under Clause 11.6 (d) of PAM Contract..

[86] The adjudicator gave a fairly elaborate justification for his decision in respect of this VO item as reflected in subpara 56(j) of the AD:

> ...
>
> (j) VO No. 16:
>
> VO No. 16 is for revise low-E glass skylight to contractor's approved proposed polycarbonate translucent sheet. The Claimant contends that the amount to be omitted should be RM 1,052,356.50, whereas the QS recommends an omission in the sum of RM 1,060,465.00 and the Respondent has allowed for an omission in the sum of RM 1,150,049.50 (based on an earlier valuation by the QS).
>
> The difference between the Claimant and the QS is the applicable rate for the polycarbonate sheets. The Claimant's rate is RM 149.50 per m2 (inclusive of a 15% mark-up pursuant to Clause 11.6(d) of the Contract applied on its cost of RM 130.00 per m2), whereas the QS' rate is RM 143.00 per m2 which it contends is reasonable.
>
> In support of its rate, the QS contends that the Claimant is not entitled to the 15% mark-up as the works can be properly valued in accordance with Clause 11.6(a), (b) or (c).
>
> Based on my reading of Clause 11.6(a), work of similar character and executed in similar conditions, then the rates in the Schedule of Rates apply. Clause 11.6(b) applies for work of similar character but executed in different conditions, then the rates in the Schedule of Rates are to be used as a basis. For Clause 11.6(c), if the work is not of similar character then, then fair market rates apply. In this case, the Claimant has applied Clause 11.6(d) presumably on the basis that none of the above situations apply, and thus it has gone with cost plus 15% mark-up as provided.
>
> I have considered the evidence for this variation. Essentially it is a change in material from low-E glass to polycarbonate sheets. The work to me is still of similar character and executed under similar conditions. However, neither party has referred to the Schedule of Rates and I therefore either Clause 11.6(a) or (b) for that matter to be able to apply. The Clause 11.6(c) situation to me it not applicable here either. That leaves us with 11.6(d) on a cost plus basis, which I accept to the applicable situation to be adopted for this variation.
>
> By reason of the matters stated above, I find that the Claimant is entitled to VO No.

16 on a cost plus 15% mark-up and *I allow the Claimant 's claim for this item in the sum of RM 1,052,356.50 (omission).*

[87] Based on the above excerpt from the AD, the adjudicator had rightly considered cl 11.6(d) of the CoC as submitted by JEKS and in fact, the adjudicator also considered cl 11.6(c) but rejected it. I am thus left wholly unconvinced by PALI's contention that the adjudicator went on a frolic of his own.

[88] With regards to VO No 20, No 23 (with SOI), No 23 (without SOI), No 31 and No 47, I have undertaken the same exercise of perusing the adjudication pleadings and the AD and I agree with JEKS that basically, the adjudicator preferred JEKS's approach as to the valuation of these items over PALI's and reasons were proffered. How the adjudicator chooses to approach the issue is a matter which is entirely within his discretion. There is no evidence that the parties were denied an opportunity to present their arguments before the adjudicator. The adjudicator has considered those arguments and arrived at his decision, whether rightly or wrongly. A case of breach of natural justice has simply not been made out by PALI (see, *Sigma Elevator (M) Sdn Bhd v Perbadanan Pengurusan City Plaza* [2020] MLJU 258).

[89] Moreover, cl 11.6 is one of the methods of valuation of variation as provided in the CoC and agreed by both parties. This is not a situation where the adjudicator had adopted a valuation procedure that is unknown to parties. In the end, as highlighted by JEKS, the total sums that it claimed for the variation works is RM9,436,529.22, but the adjudicator only awarded the sum of RM5,143,817.34.

[90] In the final analysis, PALI is dissatisfied with the weight of evidence given by the adjudicator and his findings of fact, which are not valid grounds for the court to set aside the AD.

Third ground: Whether the adjudicator acted in excess of his jurisdiction pursuant to s 15(d) of the CIPAA

[91] PALI raised three grounds in relation to the adjudicator's jurisdiction, namely:

(a) Contingent Jurisdiction 1 — The payment claim did not stipulate the due date for payment as required under para 5(2)(a) of the CIPAA;

(b) Contingent Jurisdiction 2 — The adjudicator failed to comply with the requirement under s 7 of the CIPAA by adjudicating the dispute based on the adjudication claim and not the payment claim sum; and

(c) Core Jurisdiction — PC No 24 is not due and payable.

[92] The usage of the terms 'contingent jurisdiction' and 'core jurisdiction' is as expounded by the High Court in *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case* [2017] MLJU 242 and approved by the apex court in *View Esteem* and subsequently applied in numerous decisions by the courts around the country.

Subground (a): Contingent Jurisdiction 1 — The payment claim did not stipulate the due date for payment

[93] In para 22 of the payment claim dated 19 April 2019, JEKS set out the four main items of its claim where under subpara (c), the amount of RM8,911,089.99 was claimed as 'under-valued and/or uncertified and/or rejected completed Variation Works'. This claim is reflected in the table at p 2 of the payment claim in this manner:

Claimed Amount (RM):	Basis of Claim:	Due date for Payment:	Relevant Contract Provisions
8,911,089.99	Variation Works	Up to Interim Payment Certificate No. 23 and Progress Claim No. 24	Clause 30.1, 30.2 and 11.9 of COC

[94] Pursuant to sub-s 27(1) of the CIPAA and the case of *View Esteem*, PALI submitted that the jurisdiction of the adjudicator is limited to the matters raised in the payment claim and payment response as provided under ss 5 and 6 of the CIPAA. PALI contended that the adjudicator has no jurisdiction to assess the variation works as JEKS failed to stipulate the due date for payment in the payment claim. Relying on the case of *SKS Pavillion Sdn Bhd v Tasoon Injection Pile Sdn Bhd* [2019] 9 MLJ 396; [2019] 2 CLJ 704, HC, this omission is said to contravene the mandatory requirement under para 5(2)(a) of the CIPAA which renders the payment claim to be defective and invalid. Furthermore, the omission is not an irregularity that can be cured but one that affected the jurisdiction of the adjudicator to adjudicate the variation claims.

[95] In his oral submission, Mr Sanjay Mohan argued that all claims for variation works had been submitted to PALI and so these were well within PALI's knowledge. Learned counsel drew an analogy with final claims and claims for loss and expense where no exact date needs to be stated as the due date for payment in the payment claim.

[96] I have perused the documents and I find that IPC No 23 is dated 7 March 2019 and in the valuation for the statement of work done, the variation works is set out in *Appendix E* with the recommended amount being a net

omission of RM6,890,650.64 (see exh 'LWY21' in PALI's AIS, encl 28, pp 5953–5961).

[97] PC No 24 is dated 19 April 2019 (see exh 'LWY21' in PALI's AIS, encl 28, pp 5970–5990; learned counsels have informed the court of the typographical errors at pp 5981–5990 where the documents are for PC No 24 and not PC No 23 as stated). The total value of work executed up to the date of PC No 24 in respect of the net amount of variation order is shown as RM2,020,439.35.

[98] Paras 33-35 in the payment claim state that:

'*33. Pursuant to various Variation Works related instructions issued by the S.O the Unpaid Party has also carried out and completed Variation Works, all of which within the S.O's knowledge and instructions.*

34. The Variation Works are categorised into the following items:

			Amount (RM)
a.	Total claimed Variation Works (50 Nos)	:	2,020,439.35
b.	Total certified Variation Works (39 Nos) (incorrectly omitted)	:	(6,890,650.64)
	Variance	:	8,911,089.99

35. The Unpaid Party considers that the Variation Works were either unreasonable under-valued by the S.O and/or the Non-paying Party's Quantity Surveyor ('QS') and/or under certified and/or rejected by the same. The difference between the Unpaid Party claim against the S.O and/or QS assessment is RM8,911,089.99. The Unpaid Party is now claiming for this amount in this Payment Claim.

[99] Although a calendar date was not inserted under the column 'Due date for Payment', the description of 'Up to Interim Payment Certificate No 23 and Progress Claim No 24', read together with para 34 in the payment claim, is, to my mind, sufficient to indicate that the due date for payment means 7 March 2019 for the certified amount of negative RM6,890,650.64 (omissions) and 19 April 2019 for the variation works in the sum of RM2,020,439.35.

Subground (b): Contingent Jurisdiction 2 — The adjudicator adjudicated the dispute based on the adjudication claim and not the payment claim sum

Subground (c): Core Jurisdiction — PC No 24 is not due and payable

The parties' submissions

[100] At the adjudication proceedings, PALI raised two jurisdictional challenges in respect of JEKS's claim for variation works, namely, that the sum in the adjudication claim is higher than the sum in the payment claim, and

JEKS's reliance on PC No 24 which was not due for payment when the payment claim was issued (see paras 25 and 26 in the adjudication response and subparas 27(d) and (e) in the AD).

[101] In paras 18–24 of the adjudication reply, JEKS contended that its variation claims is a subject matter within the jurisdiction of the adjudicator since, even though the amount claimed has increased by RM525,439.23 from RM8,911,089.99 to RM9,436,529.22, this is a mere enhancement as a result of discussions between the parties in April 2019 and there is no new claim introduced in the adjudication claim. As for the allegation that JEKS's claim for variation works is premature, JEKS had provided a table which set out the particulars of the variation works and the dates when the variation claims were previously submitted. Based on the details tabulated and the case of *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2016] 7 MLJcon 119; [2015] 8 CLJ 728, JEKS asserted that by the time the adjudication claim was submitted on 15 August 2019, the sums claimed in PC No 24, which was submitted on 19 April 2019, would have been due and payable.

[102] The adjudicator dealt with the jurisdictional challenges in paras 49–52 of the AD. The adjudicator said that he had reviewed JEKS's claims for variation and he could not find any new claim introduced for variations, except for changes in quantum to a few items. The adjudicator went on to refer to sub-s 27(1) of the CIPAA and opined that:

> 51. ...
>
> To me the word 'matter' is restrictive to the substantive issues and claims raised by the Claimant in its claim for interim payment certificate no. 23. I however do not see Section 27(1) as imposing any restriction on the quantum for substantive issues and claims already raised in the Payment Claim. However, in respect of any claims arising from interim payment certificate no. 24 which was not yet due for payment when the Payment Claim was served, I accept the Respondent's contention that any new substantive issues and claims raised by the Claimant should not be the subject matter of these adjudication proceedings.
>
> 52. By reason of the matters stated in paragraph 51 above, *I hereby exercise my discretion to proceed to determine the Claimant's claims for variations in the context of interim payment certificate no. 23 and not interim payment certificate no. 24, but if I find any evidence that assists me in making a better judgment as to the quantum due for interim payment certificate no. 23, I will consider such evidence.*

[103] In the submissions before this court, PALI highlighted the difference between the total amounts claimed by JEKS in the following three documents:

Document	JEKS's claimed sum (RM)	Valuation for Interim Certificate No 23 (RM)	Total amount claimed by JEKS (RM)
Actual claim in PC No 23	1,040,673.42	(6,890,650.64)	7,931,324.06
Payment claim (up to PC No 24)	2,020,439.36	(6,890,650.64)	8,911,090.00
Adjudication claim (exceeding PC No 24)	2,545,878.58	(6,890,650.64)	9,436,529.22

[104] Mr Sivabalan fervently argued that the adjudicator's findings are wrong for the following reasons:

(a) JEKS had claimed different amounts in PC No 23, the payment claim and adjudication claim. If JEKS's claim was based on PC No 23, then the amount claimed in the payment claim should have been RM7,931,324.06. However, JEKS claimed a sum of RM8,911,090 in the payment claim which is an increase of RM979,765.94 as compared to PC No 23. Thereafter, JEKS claimed a sum of RM9,436,529.22 in the adjudication claim and there was a hike of RM1,505,205.16 from PC No 23;

(b) JEKS did not provide the details of the items claimed under PC No 23 and PC No 24 in the payment claim;

(c) JEKS did not advance any explanation as to how the amount claimed in the adjudication claim was enhanced to a higher sum as compared to the payment claim. JEKS did not identify the values of payment due under PC No 23 and PC No 24 and the items which were affected by the alleged 'mere enhancement';

(d) the adjudicator should have scrutinised the exercise of his power in re-evaluating the value of variation claims under PC No 23 in view of PALI's jurisdictional challenge in relation to PC No 24 and ought to have requested JEKS to identify the value of PC No 23 and PC No 24 in the payment claim and adjudication claim;

(e) in accepting the change in the values between the adjudication claim and payment claim as a mere enhancement, the adjudicator failed to direct his mind to the pertinent jurisdictional challenge on PC No 24. Due to this failure, the adjudicator considered the documents related to PC No 24, which was not due and payable, in assessing the value of variation under PC No 23 and thus he acted in excess of jurisdiction; and

(f) JEKS is bound by the payment period as provided in cl 15 of the LoA and cl 30.1 of the COC. The payment period for PC No 24 had not lapsed at the time when the payment claim was issued on 19 April 2019 and therefore JEKS is not an 'unpaid party' within the meaning of s 4 of the CIPAA in the context of that PC.

The findings of the court

[105] It must be stressed at the outset that a verdict on the jurisdictional issues raised by PALI was not a matter that was immediately obvious or straightforward. The learned counsels had patiently and painstakingly provided the clarifications and further written submissions as requested by the court and in the process, they had the opportunity to review their respective initial positions on the issue as to whether the adjudicator had indeed considered new claims for variation works in PC No 24, despite the fact that the adjudicator himself had said that he shall determine JEKS's claims for variation works in the context of PC No 23 only since claims arising from PC No 24 were not yet due for payment at the time when the payment claim was served on PALI.

[106] In this regard, PALI expanded the initial examples of new claims consisting of eight VO items With SOI and three VO items without SOI as per para 37 in the first written submissions to include six more examples of VO items Without SOI in subpara 6(a)(xi) of its reply submissions making it a total of 17 VO. These were further detailed in Appendices A to C in PALI's supplementary submissions 2.

[107] The more notable departure from the earlier position came from JEKS. On the hearing date, JEKS was adamant that there are no new claims in PC No 24 and the adjudicator did not act in excess of his jurisdiction. The justification given was that the claim procedure is as set out in cl 11 of the CoC and there is no contractual requirement for the variation claims to be made only in the form of PCs. JEKS had submitted its claim for variation in 2018 and early 2019, which is prior to PC No 24. PALI's consultants had the opportunity to assess JEKS's variation claims, and these were either rejected and/or under-certified, thus, applying the English cases of *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] All ER (D) 11 and *Bovis Lend Lease Ltd v Trustees of the London Clinic* [2009] EWHC 64 (TCC), leading to a dispute even before the issuance of the payment claim. In any event, JEKS contended that the adjudicator finally awarded a sum of RM5,143,817.34 which is significantly lower than the amount claimed in the payment claim and adjudication claim.

[108] However, following the clarification session, JEKS submitted that, in the event the court takes the view that there are merits in PALI's arguments, JEKS's proffered its own tabulation of the variation claims with a total of 11 VO as the ones which were claimed for the first time in PC No 24 (see para 16 of the reply submissions). It was further submitted that these 11 variation claims amounting to RM499,075.30 can be severed. The court was urged to exercise its powers to vary the adjudicated sum in respect of variation works from RM5,143,817.34 to RM4,644,742.04 making the total adjudicated sum to be RM8,013,661.73.

[109] I have undertaken a close examination of the VO items and different computations as put forth by the parties in the various tables in the submissions and the documents in exh 'LWY21', in particular the Summary Of Variation Order Works in PC No 23 (pp 5933—5936, encl 28) and PC No 24 (pp 5981–5990, encl 28) including the remarks 'updating' in the former and the columns with the header rows 'JEKS — PALI — consultants meeting 4.4.2019' and 'Notes' in the latter, and it is my finding that:

(a) it is possible to identify the variation claims that were first claimed in PC No 24 ie by comparing the items in PC No. 23, PC No 24 and the *Summary Of Variation Works With And Without SOI* at paras 58 and 59 of the AD;

(b) for the *Summary Of Variation Works With SOI*, the VO which were claimed in PC No 24 are as stated in para 16 of JEKS's Reply Submissions where the total sum is RM245,306.48; and

(c) for the *Summary Of Variation Works Without SOI*, the VO which were claimed in PC No 24 and is not given 0.00 value by the adjudicator is VO No 30 in the sum of RM253,768.82.

[110] The abovesaid conclusions are detailed in the following table:

Summary of variation works with SO instructions		
VO No	Variation Description	Adjudicator's Decision (RM)
33.	Additional FM office and manager room (ceiling finishes — skim coat & painting)	134,440.87
39.	Additional M&E rooms and ELV rooms to office A, B, C & FM Office	25,177.70
45.	Roof covering adjustment along FM office and pedestrian walkway	47,740.00
46.	Crash barrier for the hose reel drum along Forklift Accessway (MIW)	18,506.91

48.	Replace timber door with fire door at Office A	17,461.00
49.	Replace Lockset and additional door stopper	0.00
50.	Cow Grass Beyond Boundary	1,980.00
	TOTAL	245,306.48

Summary of variation works without SO instructions		
VO No	Variation Description	Adjudicator's Decision (RM)
25.	Delivered and uninstalled Hormann door	0.00
29.	Polycarbonate Sheet for DB Box	0.00
30.	Removal of damaged interlocking pavers and reinstall using stockpile of existing interlocking pavers	253,768.82
31.	Pipe support at Gridline K by Chee Kong	0.00
33.	Carpark structure by Chee Kong	0.00
35.	Aluminium Panel at Guard House & Curtain Pelmet at Office A	

[111] Despite the gallant attempts by JEKS's counsel to persuade the court to vary the adjudicated sum to RM8,013,661.73, I am compelled to agree with PALI's submission that by considering and deciding on variation claims which were not due for payment at the time when the payment claim was issued, the AD has fallen to be challenged in the realm of core jurisdiction. In these circumstances, it would be wrong for me to close my eyes to the jurisdictional error made by the adjudicator which has resulted in his finding on Issue No 3 on the claim for variations to be tainted as it includes both items from PC No 23, which is within his jurisdiction, and items from PC No 24, which he is devoid of any jurisdiction.

(B) OS NO WA-24C-5–01 OF 2020

(i) Enforcement application (encl 1)

Whether the AD should be severed?

[112] The parties do not dispute the clear provisions of sub-s 28(1) and (2) of the CIPAA to the effect that JEKS may enforce the AD by applying to this court for an order to enforce the AD as if it is a judgment or order of the High Court and that this court may make an order in respect of the AD either wholly

A or partly. The point of difference in the position of the parties is as to whether the court ought to sever the sum of RM5,143,817.34 which was allowed by the adjudicator for JEKS's variation works.

B **[113]** PALI argued that the court should set aside the entire AD and dismiss the enforcement application instead of looking into every individual VO, lest the court would find itself assuming the role of the adjudicator. Furthermore, the exercise of looking into each VO item to sever would involve complications in computations and there would be difficulty in calculating the total sum due to JEKS for variation works.

C

[114] In an attempt to 'save' part of the AD, Mr Sanjay Mohan submitted that the court has the power to vary the adjudicated sum and it would be limited to the amounts for variation works.

D

The findings of the court

[115] In arriving at my decision on the issue of severance, I was very much assisted by the decision of Lee Swee Seng J (now JCA) in *TYL Land and Development Sdn Bhd v SIS Integrated Sdn Bhd and another case* [2018] MLJU 217; [2018] 2 MLRH 699 at paras 115–135. I additionally note that His Lordship had also dealt with the issue of severance in *PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd and other suits* [2017] MLJU 905, *YTK Engineering Services Sdn Bhd v Towards Green Sdn Bhd and other applications* [2017] MLJU 632; [2017] 5 AMR 76 (where the court held that, on the facts of the case, the issue of severance does not arise) and *Emerald Capital (Ipoh) Sdn Bhd v Pasukhas Sdn Bhd and another appeal* [2018] MLJU 440.

E

F

G **[116]** Meanwhile, Lim Chong Fong J in *Harmony Teamwork Construction Sdn Bhd v Vital Talent Sdn Bhd* [2017] 10 MLJ 726; [2017] 4 AMR 580 has expressed the view that the order for enforcement in part pursuant to sub-s 28(2) of the CIPAA is only applicable where part of the adjudication decision has been set aside pursuant to s 15 of the CIPAA by reason that it was H improperly procured or otherwise adjusted as in the *PCP Construction* case (see too, *Vital Talent Sdn Bhd v Harmony Teamwork Construction Sdn Bhd* [2017] MLJU 1160. It is noted that in *Naza Engineering*, the court had to deal with the situation where there was only an application to set aside the adjudication decision under s 15 of the CIPAA without the usual accompaniment of an I application for enforcement under s 28).

[117] In *TYL Land*, the court traced the developments in the United Kingdom (see *Cantillon*, *Paice (Gary) and Springall (Kim) v Harding (Matthew J) (trading as MJ Harding Contractors)* [2016] EWHC B22 (TCC) and *Bovis*

Lend Lease) and Australia (see *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106) which have seen a shift in favour of severance of adjudicators' decisions in appropriate cases. Lee Swee Seng J (now JCA) then said that:

> [124] It makes a lot of sense where there are several heads of Claim in a Payment Claim to separate and sever that which is in compliance with the Act that which is not in compliance. In our present case, it had been held that the Adjudication Decision with respect to Interim Certificates No 3, 4 and 5 was given in breach of natural justice whereas that part of the Payment Claim which was allowed for Progress Claim No 7 (Rev 2) was made within jurisdiction and that there had not been any breach of natural justice.
>
> [125] This is a proper case where the unaffected part may be nicely and neatly severed and separated from the affected and infected part not unlike the separating of the wheat from the chaff. Here is where, having in mind the over-arching purpose of the CIPAA, we must not be unduly technical and to be swayed by form over substance.
>
> ...
>
> [127] Much time and energy would have to be dissipated unnecessarily if the whole Decision has to be set aside when this court had found nothing justifying the setting aside that part of Decision with respect to the sum of RM468,385.36 together with simple interest of 5% per annum after the last date for payment on 1 July 2017 until full payment.
>
> [128] To have to also set aside the part unaffected would be prejudicial to the claimant who would have to proceed with adjudication all over again and in the meanwhile could not proceed to enforce the part of the Adjudication Decision in its favour.
>
> Pronouncement
>
> [129] Therefore I had set aside only that part of the Adjudication Decision with respect to Interim Certificates No 3, 4 and 5 for the sum of RM1,292,721.32 together with the interest allowed.
>
> [130] That part of the Adjudication Decision with respect to the sum allowed for Progress Claim No 7 (Rev 2) remains intact and unaffected ie the sum of RM468,385.36 together with the interest allowed.
>
> [131] As for costs, fees and expenses, it should correspondingly be reduced by 75% which is roughly the percentage that was set aside where the monetary sum is concerned.
>
> ...

[118] Having reviewed the case authorities as above cited, I am supportive of the approach of severing the part of an adjudication decision which is not affected by a breach of natural justice or excess of jurisdiction within the meaning of limbs (b) and (d) of s 15 of the CIPAA and allowing the

'uncontaminated' part to be enforced pursuant to sub-s 28(2) of the CIPAA provided that this can be clearly identified and neatly separated from the part of the adjudication decision which has to be set aside. It is my considered opinion that the instant case is one where severance of the AD is compelling, sensible and well suited to meet the justice of the case.

[119] Following from the decision of this court that the adjudicator had no jurisdiction to deal with JEKS's claims for variations, that part of the AD (see 'Issue No 3' in the table under para 117) must be set aside together with the interest allowed on the sum affected ie RM5,143,817.34. The other parts of the AD are unaffected ie the sum of RM3,368,919.69 together with the interest thereon as allowed by the adjudicator. However, the quantum of costs to be borne by PALI should correspondingly be reduced by 60% which is the approximate percentage of the amount that is set aside as against the sum of RM8,512,737.03. The reduced costs would thus be RM60,929 with the AIAC registration fee and adjudicator's appointment fee remaining intact.

[120] Correspondingly, JEKS's application for leave to enforce the AD is allowed for the sum of RM3,368,919.69 with interest thereon as ordered by the adjudicator and costs of the adjudication proceedings in the sum of RM60,929.

(ii) Stay application (encl 4)

The parties' submissions

[121] PALI gave the following reasons in submitting that the AD should be stayed pursuant to s 16 of the CIPAA:

(a) PALI has made an application to set aside the AD under s 15 CIPAA;

(b) the subject matter of the AD is pending final determination in arbitration;

(c) there are clear and unequivocal errors in the AD that warrant a stay of the same pending the determination of the arbitration. The errors are essentially the grounds relied upon by PALI in the setting aside application; and

(d) JEKS is in dire financial straits and unable to repay the adjudicated sum to PALI should PALI succeed in its set off and/or counterclaim in the arbitration. Hence, a stay ought to be granted to meet the justice of the case.

[122] In resisting the stay application, JEKS stressed, firstly, that PALI's set off/crossclaim as laid out in the response to the notice to arbitrate are

substantially similar to PALI's set off/crossclaim in the adjudication proceedings, which after having been considered by the adjudicator, still resulted in the award of a sum in favor of JEKS. In view of the fact that adjudication decisions are meant to alleviate cash flow issues faced by contractors and that they have temporary finality, there is no reason to stay the AD pending the determination in the arbitration proceedings. Secondly, JEKS fervently argued that its is commercially solvent and the issue of it not being able to repay the adjudicated sum to PALI simply does not arise.

The findings of the court

[123] Having considered the averments by the parties and the supporting evidence as well as the submissions by the learned counsels, the court is of the view that there are no valid grounds to stay the enforcement of part of the AD which remains intact in the sum of RM3,368,919.69 together with interest and the apportioned costs of the adjudication proceedings as pronounced earlier.

[124] The fact that PALI has pursued an application to set aside the AD under s 15 of the CIPAA and there is a pending arbitration between the parties over the same dispute means that PALI has met the threshold requirements as provided in sub-s 16(1) of the CIPAA to apply for a stay of the AD. However, these pre-conditions, on their own would not be sufficient for an order for stay to be made. The court is still duty bound to evaluate PALI's application on its merits without the fetter of a pre-determined test which is not expressly stated in s 16 of the CIPAA. The court may stay the AD where there are clear errors, or to meet the justice of the individual case. Other factors which the court can consider in deciding whether to grant a stay or otherwise would include JEKS's financial capacity to repay the adjudicated sum (see *View Esteem*).

[125] In so far as the issue as to whether there are clear and unequivocal errors is concerned, since these are basically premised on the same grounds which have been considered and rejected by the court based on the prior analysis, PALI's arguments in this regard do not assist to advance its case for a stay of the AD. As for the adjudicator's findings in respect of JEKS's claims for variation works which have been proven to be tainted with jurisdictional error, this Court has taken the view that this is an appropriate case for severance of the part of the AD where the adjudicator has exceeded his jurisdiction rather than to set aside the entire AD. In the same vein, there is no compelling reason as to why the court should stay the enforcement of the AD which is not affected by any jurisdictional errors on the part of the adjudicator.

[126] Following from the above, the only issue left which requires closer examination pertains to JEKS's alleged precarious financial position. There are

A several aspects to PALI's submissions that JEKS's financial position constitutes special circumstances to grant a stay and that it is not attributable to PALI's non-payment of the adjudicated sum to JEKS. These are dealt with in turn below:

B (a) there are nine pending suits against JEKS including two winding up petitions:

Based on the CTOS search conducted by PALI on 9 January 2020 (exh 'LWY5' in PALI's AIS, encl 5), various parties have filed suits against JEKS. PALI claimed that this shows that JEKS is facing financial C difficulties as it is unable to make payments to these plaintiffs. On the other hand, JEKS contended that these suits have been either settled or discontinued (refer exhs 'A5' and 'A6' in JEKS's AIR, encl 10 and exhs 'A1' and 'A2' in encl 12).

D I have scrutinised the parties' exhibits and the status of the suits is summarised in the following table:

No.	Case details	Status
1.	Winding Up Petition No WA-28NCC-647–07 of 2019 Ji Long Hardware Trading	The petition was struck out on 31 December 2019 with liberty to file afresh.
2.	Winding Up Petition No WA-28NCC-1290–127 of 2019 Ji Long Hardware Machinery Sdn Bhd	JEKS have affirmed affidavits on 24 February 2020 and 26 February 2020 to oppose the Petition which has been fixed for hearing on 13 May 2020. JEKS is alleged to owe the petitioner the sum of RM462,218.63 as at 23 April 2019 for goods sold and delivered and repairs and workmanship services rendered.
3.	Civil Suit No WA-22NCvC-711–107 of 2018 EFCO (M) Sdn Bhd	Hearing date on 6 September 2019.
4.	Civil Suit No WA-B52C-19–037 of 2019 KTN Construction Sdn Bhd	Hearing date on 6 May 2019.
5.	Civil Suit No WA-A52NCC-1652–077 of 2019 Hormann Doors Malaysia Sdn Bhd	Consent judgment for the sum of RM130,000 to be paid by six post-dated cheques from 28 January 2020 until 28 June 2020 was recorded on 3 December 2019.

6.	Civil Suit No WA-A72–129–087 of 2019 Wong Joon Keet	Consent judgment for the sum of RM40,000 to be paid by eight post-dated cheques, each for the amount of RM5,000 from 30 November 2019 until 30 June 2020, was recorded on 15 November 2019. JEKS's counterclaim was withdrawn with no liberty to file afresh and no order as to cost.
7.	Civil Suit No BA-A52C-26–087 of 2019 Utracon Construction Sdn Bhd	Notice of Discontinuance was filed on 10 February 2020 with liberty to file afresh and no order as to cost.
8.	Summons No WA-A72NCvC-6953–107 of 2019 Top Slings Trading Sdn Bhd	Hearing date on 11 October 2019.
9.	Summons No WA-A72NCvC-49448–107 of 2019 Top Slings Trading Sdn Bhd	Consent Judgment for the sum of RM29,261.32 to be paid by three post-dated cheques dated 31 December 2019, 31 January 2020 and 29 February 2020 was recorded on 17 December 2019.

It is observed from the CTOS Report that JEKS itself has instituted four civil suits against three companies with one being a winding up petition.

Viewed in its entirety, the number of pending suits against JEKS and those instituted by JEKS against other parties are the same ie four each. The other suits faced by JEKS have either been discontinued or settled. The fact that JEKS has agreed to record consent judgments with some of the plaintiffs indicates that JEKS has made sincere attempts to settle its debts albeit payments are through several post-dated cheques. There is no evidence to show that any or all of these cheques were dishonored and nor that the pending civil actions against JEKS are so numerous and of such severity such that JEKS can be said to be in dire financial straits.

(b) *JEKS's report and financial statements 31 December 2017:*

PALI alleged that this document (exh 'LWY7' in PALI's AIS, encl 6) supports its contention that currently JEKS has poor financial standing due to the following:

(i) JEKS had a very bad cash flow in the years 2016 and 2017 where for the former it was (RM3,507,099). Furthermore, JEKS had deposited RM2,343,719 pledged to licensed banks as securities for banking facilities in 2017. However, PALI conveniently omitted to mention that

A the cash flow for 2017 was RM831,693;

(ii) the debt to equity ratio shows that JEKS is borrowing six times as much funding as it owns and so it appears that JEKS is financing its growth with debt. The high debt to asset ratio shows risk that the business will not generate enough cash flow to service its debt. The interest coverage ratio further shows that JEKS will have difficulties to meet the interest expense. A tabulation of JEKS's Financial Capacity can be seen in exh 'LWY9', encl 6. JEKS retorted that a reading of more than one indicates that a company is financially healthy as is the case for JEKS where its ability to pay short term obligations using current assets for 2016 is 1.66 and for 2017 is 1.13. This means that JEKS is still able to convert its current assets to settle the current liabilities. Similarly, its quick ratio is also more than one for the year 2016 and 2017, signifying that it is still able to sustain itself even if all the current creditors require immediate payments. Furthermore, JEKS pointed out that there is substantial investment to its fixed assets that has been grossly undervalued and overall, its balance sheet remains strong;

(iii) JEKS made losses in the year 2017 viz (1,376,703) due to its poor management as its direct costs and administration expenses are too high. Nevertheless, the court notes that JEKS has total assets of RM92,922,471 and total equity of RM12,952,623 as opposed to total liabilities of RM79,969,848; and

(iv) JEKS is facing legal action by a customer who is claiming compensation in the sum of RM48,477.576 for purported sub-quality works in the construction of a two-storey warehouse cum office in Shah Alam. However, JEKS has explained in its affidavits (encls 10 and 23) that it has counterclaimed for the sum of RM17.7m and has an enforced adjudication decision in its favor amounting to RM5.6m. In any event, the matter which was initially pending arbitration, has since been resolved by the parties.

(c) *failure to file the Financial Statements for year 2018*:

PALI cited ss 258 and 259 of the Companies Act 2016 (Act 777) as the legal provisions under which JEKS has to circulate the financial statements and reports within six months of its financial year end and to lodge with the Registrar within 30 days from the financial statements and reports being circulated to its members for each financial year. PALI contended that, in the absence of the report and financial statements for 2018, it is highly likely that JEKS is still in the same bad financial position. In the AIR, JEKS averred that the said report and financial statements is in the midst of finalisation. In my opinion, the determination as to JEKS' financial standing should be made with reference to documents which have been exhibited as evidence. To allow otherwise would result in the Court entering the realm of

speculations/conjectures. This would indeed be unfair and prejudicial to JEKS;

(d) *statement of final account and PALI's set off/crossclaim:*

Based on the statement of final account dated 17 December 2019 (exh 'LWY10', encl 6), the revised contract sum is RM132,613,138.16. According to PALI's calculations by taking into account the amounts that it has paid JEKS, the interim certificate No 24, the second moiety of the retention sum that is due after the issuance of the certificate of making good defects, LD and penalties for external and infrastructure works, and health, safety and environment non-compliance, a sum of RM872,119.11 is actually owing by JEKS to PALI, and this is without considering PALI's counterclaim. In the arbitration, PALI's set off and/or counterclaim stands at RM20,785,143 and it has reserved its rights to amend, supplement, abandon and/or add to the matters, claims and reliefs stated in the response to notice to arbitrate.

JEKS responded that the issue relating to the Statement of Final Account is irrelevant to the present proceedings since the document was not submitted for purposes of the adjudication proceedings and the matter was not raised at all. Moreover, the adjudicator has considered PALI's set off and crossclaim and decided on the same (see Issues Nos 4, 5, 6, 7, 8, 9 and 10 in the AD). I am inclined to agree with JEKS in this respect.

(e) *payment to bond M & E Sdn Bhd*:

Pursuant to an adjudication decision dated 3 January 2020, JEKS is required to pay the adjudicated sum of RM3,387,425.44 to Bond M & E Sdn Bhd (exh 'LWY10', encl 6). PALI averred that this will severely affect the financial position of JEKS.

[127] Apart from the views already expressed in respect of some of JEKS's responses to PALI's contentions as outlined above, I reiterate that I have considered all of PALI's arguments that there are special circumstances to warrant a stay grounded on JEKS's purported precarious financial standing. In my assessment, JEKS has successfully neutralised whatever points raised by PALI, especially with regards to the report and financial statements 31 December 2017. JEKS' overall monetary status has not reached a level of financial distress where it can be said that, on a balance of probabilities, JEKS would be unable to repay the sum of RM3,368,919.69 together with simple interest thereon and costs of the adjudication proceedings in the sum of RM60,929.

[128] Moreover, I am inclined to accept JEKS's affirmations that PALI's continuous non-payment of the certified sums to JEKS has had an impact on JEKS's cash flow. As can be seen from the payment claim, the unpaid certified works done based on interim payment certificates Nos 19 to 23 have been due

since 7 October 2018, 14 November 2018, 16 December 2018, 20 January 2019 and 7 April 2019, respectively. In the meantime, JEKS has had to bear the financing charges for the project. Seen in its proper perspective, I am not convinced that the evidence adduced by PALI is such that I should exercise my discretion in favor of PALI by allowing the stay application.

PRONOUNCEMENT

[129] Consequent to the pronouncement of the court as to the decision for all three applications, Mr Sivabalan had addressed the court on the issue of costs. Learned counsel proposed that the principle of costs to follow the event to be followed. Since PALI succeeded on a partial basis for the setting aside application and enforcement application but failed in the stay application, PALI should be awarded one set of costs ie RM50,000 for the setting aside application. The justification given was that the legal team had to work long hours and on weekends to prepare the many rounds of written submissions and it was difficult for them to discuss the submissions with the client. It was suggested that costs for the stay application be ordered to JEKS and that there be no order as to costs for the enforcement application.

[130] Ms Wong Li-Wei who submitted for JEKS believed that RM50,000 is excessive and that JEKS should not be penalised for costs when they have not been paid and is unable to enforce part of the AD. Learned counsel offered RM5,000 as costs for the setting aside application, RM5,000 for the stay application and no order as to costs for the enforcement application.

[131] Having deliberated on these submissions, the court ordered costs of RM18,000 for the setting aside application to be borne by JEKS, RM5,000 for the stay application to be paid by PALI and no order as to costs for the enforcement application. The order as to costs are subject to the usual payment of the allocator fees.

Setting aside and enforcement application allowed in part; and stay application dismissed.

Reported by Nabilah Syahida Abdullah Salleh